THE BEST LAID PLANS OF CORPORATIONS AND CONSUMERS: THE THIRD CIRCUIT, §§ 1123 AND 1322(b)(2) OF THE BANKRUPTCY CODE, AND NEW JERSEY'S MERGER DOCTRINE

*Lori B. Riga**

I. Introduction

The United States Constitution gives Congress authority to establish bankruptcy laws.[1] One of the most formidable reasons for congressional involvement in bankruptcy legislation is to alleviate the harsh effects of insolvency[2] on the debtor.[3] Title 11 has differ-

* B.A., History, Ohio State University (*cum laude*); M.A., European History, Kent State University; J.D., Seton Hall University School of Law, anticipated 1995.

1 U.S. CONST. art. I, § 8, cl. 4. Congress can establish "uniform Laws on the Subject of Bankruptcies throughout the United States." *Id.*

2 "[I]nsolvent" means—

(A) With reference to an entity other than a partnership and a municipality, financial condition such that the sum of such entity's debts is greater than all of such entity's property, as a fair valuation, exclusive of—

ent chapters that provide different types of relief for various debtors.[4] Specifically, chapter 13 of the Bankruptcy Code (hereinafter "the Code") primarily provides relief for consumer[5] or small business debtors, and chapter 11 typically aids larger business debtors.[6] These chapters allow debtors to reorganize rather than to liqui-

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(i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; and
(ii) property that may be exempted from property of the estate under section 522 of this title;
(B) with reference to a partnership, financial condition such that the sum of such partnership's debts is greater than the aggregate of, at a fair valuation—
(i) all of such partnership's property, exclusive of property of the kind specified in subparagraph (A)(i) of this paragraph; and
(ii) the sum of the excess of the value of each general partner's nonpartnership property, exclusive of property of the kind specified in subparagraph (A) of this paragraph, over such partner's nonpartnership debts;. . . .

11 U.S.C. § 101(31) (1978).

[3] "Debtor" means a "person or municipality concerning which a case under this title has been commenced." 11 U.S.C. § 101(12) (1978). For purposes of bankruptcy legislation *see, e.g.*, Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (stating that one of the primary purposes for implementing the 1898 Bankruptcy Act was to relieve debtors from insolvency and allow them to obtain a fresh start without requiring them to repay the amount of indebtedness) (citing Williams v. U.S. Fidelity & G. Co., 236 U.S. 549, 554-55). *See also infra* section II of this note for origins of debtor/creditor relationships.

[4] *See* 11 U.S.C. § 109 (1978) (defining who may be a debtor).

[5] "[C]onsumer debt" means debt incurred by an individual primarily for a personal, family, or household purpose. 11 U.S.C. § 101(7) (1978). Chapter 13 of the Bankruptcy Code allows "individuals with regular income" to file bankruptcy. *See infra* note 6 discussing chapter 11 and chapter 13 found in Title 11. The Bankruptcy Code defines an "individual with regular income" as an "individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title, other than a stockbroker or a commodity broker." 11 U.S.C. § 101(29) (1978).

[6] Section 109 explains each chapter and who is eligible to file thereunder. The statute reads in relevant part:

(b) A person may be a debtor under chapter 7 of this title only if such person is not—
(1) a railroad;
(2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, credit union, or industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. § 1813(h)); or
(3) a foreign insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, or credit union, engaged in such business in the United States.

date.[7] Statutes within chapters 11 and 13 promote a debtor's fiscal responsibility by providing a plan under which the debtor will pay creditors and financially recuperate during a three- to five-year span.[8] The plan provisions allow debtors to modify[9] the claims[10] of

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(c) An entity may be a debtor under chapter 9 of this title if and only if such entity—

(1) is a municipality . . . .

(d) Only a person that may be a debtor under chapter 7 of this title, except a stockbroker or a commodity broker, and a railroad may be a debtor under chapter 11 of this title.

(e) Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $100,000 and noncontingent, liquidated, secured debts of less than $350,000, or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $100,000 and noncontingent, liquidated, secured debts of less than $350,000 may be a debtor under chapter 13 of this title.

(f) Only a family farmer with regular annual income may be a debtor under chapter 12 of this title. . . .

11 U.S.C. § 109 (1978).

The Supreme Court recently interpreted this statute to determine whether an individual debtor may also file under chapter 11. Toibb v. Radloff, 501 U.S. 157 (1991). In this case, an individual without any ongoing business attempted to file a bankruptcy petition under chapter 11. *Id.* at 158. The Court first looked to the plain language of the statute and determined that Congress did not expressly preclude individuals without businesses from filing under chapter 11. *Id.* at 160. The Court reasoned that although Congress primarily intended chapter 11 to apply to business debtors, nothing in the statute prohibited individuals from reorganizing under chapter 11. *Id.* at 161. Further, the expense and complexity of filing chapter 11 would preclude individuals from "flooding the bankruptcy courts" with chapter 11 reorganization plans. *Id.* at 165.

7 "Liquidation" is the "act or process of settling or making clear, fixed, and determinate that which before was uncertain or unascertained." BLACK'S LAW DICTIONARY 931 (6th ed. 1991). Some examples of liquidation are "[p]ayment, satisfaction, or collection; realization on assets and discharge of liabilities." *Id.* "Reorganization" means the "act or process of organizing again or anew." *Id.* at 1298. *See also supra* note 6 on purposes of chapter 11 and chapter 13.

8 *See infra* note 12 for full text of §§ 1123, 1322 and the specific requirement that the plan be implemented in a three- to five-year period.

9 "Modify" means "to alter; to change in incidental or subordinate features; enlarge, extend; amend; limit, reduce. Such alteration or change may be characterized, in quantitative sense, as either an increase or decrease." BLACK'S LAW DICTIONARY 1004 (6th ed. 1991). Although this definition is a general one, it is a term often used in bankruptcy law. For example, chapter 11 debtors must categorize different creditors' interests into groups or classes. 11 U.S.C. § 1123(a)(1) (1978). While § 1123 does not specify that all creditors with similar claims be treated similarly, most courts require debtors to do so. 2 BASICS OF BANKR. AND REORGANIZATION, PRAC. L. INST. 525

many creditors.[11] However, chapter 13 of the Code prohibits modification of creditors whose sole claims are in the debtor's residence.[12]

To determine the rights of creditors whose interests lie in the debtor's property, bankruptcy courts traditionally look to state property laws.[13] Problems can develop, however, because these

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(1993). When dealing with these creditor classes under the reorganization plan, the debtor must state whether or not he will be "impairing" these creditors' interests. *Id.* at 528. An interest is impaired unless the "legal, equitable and contractual rights of the claimant or interest holder are not altered or *modified.*" *Id.* (emphasis added). *See also* 11 U.S.C. § 1124(1) (1978).

10 "[C]laim" means—

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(4) (1978).

11 "[C]reditor" means—

(A)n entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;. . . .

11 U.S.C. § 101(9) (1978).

12 11 U.S.C. §§ 1123, 1322 (1978). Although chapter 13 specifically prohibits debtors from modifying claims in their principal residence, the analogous chapter 11 statute contains no such reference. These statutes read in relevant part:

§ 1123 Contents of plan

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall-

(5) provide adequate means for the plan's implementation, such as. . .

(D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate. . . .

§ 1322 Contents of plan—

(b) subject to subsections (a) and (c) of this section, the plan may. . .

(2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence. . . .

(3) provide for the curing or waiving of any default;. . . .

(5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due;. . . .

11 U.S.C. §§ 1123, 1322 (1978).

13 Butner v. United States, 440 U.S. 48 (1979). In this case, the Supreme Court

courts must look to both federal bankruptcy and state property law when determining a debtor's rights after filing bankruptcy. One such conflict develops in New Jersey's federal bankruptcy courts when a creditor obtains a foreclosure judgment.[14]

Under New Jersey law, once a creditor secures a foreclosure judgment, the mortgage ceases to exist and all contract rights under the mortgage are extinguished.[15] Similarly, the debtor's rights to pay the mortgage over a period of time terminate while the creditor, at that moment, is entitled to full and immediate payment of the remaining mortgage sum.[16] If the debtor is unable to pay, the creditor then is entitled to hold a sheriff's sale[17] to satisfy the amount of the judgment.[18] The sole remedy against such a sale to which a debtor may resort is a ten-day redemption period.[19]

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first validated this bankruptcy court practice under the new Code noting that Congress essentially has left an individual's property rights to states' determinations. *Id.*

14 11 U.S.C. § 101(33) (1978). Once a mortgage holder receives a foreclosure judgment in state court, the bankruptcy court will recognize this judgment as a "judicial lien." The Code defines "lien" as a charge against or interest in property to secure payment of a debt or performance of an obligation. Additionally, it defines "judicial lien" as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." 11 U.S.C. § 101(32) (1978).

Traditionally, federal bankruptcy law was debtor-benevolent. New Jersey property law, however, is pro-creditor because it permits banks to foreclose on an individual's home. *See infra* Sections III. A. and IV. of this note regarding federal bankruptcy and New Jersey property law policies.

15 *See* Colonial Bldg.-Loan Ass'n v. Mongiello Bros., 184 A. 635, 637-38 (N.J. Ch. 1936) (finding that once mortgage debt is reduced to judicial decree, then only way decree will be "reopened" is in cases of fraud or mistake); Hudson Trust Co. v. Boyd, 84 A. 715, 715-16 (N.J. Ch. 1912) (holding that once a court enters a final decree, the parties may not negotiate differently, thereby making mortgage contract a "nullity"). *See also* N.J. STAT. ANN. §§ 2A:50-41, -44, -47, -50, and -51 (West 1952) (providing specific instances where mortgage does not merge into judgment). For other merger jurisdictions *see infra* note 196.

16 N.J. STAT. ANN. § 2A:50-43 (West 1952).

17 "Sheriff's sale" is defined as "[a] sale, commonly by auction, conducted by a sheriff or other court officer to carry out a decree of execution or foreclosure issued by a court. Examples include sales pursuant to attachments, liens and mortgage defaults." BLACK'S LAW DICTIONARY 1376 (6th ed. 1991).

18 N.J. STAT. ANN. § 2A:50-19 (West 1952) entitled "Sale of mortgaged premises by sheriff or other officer" states as follows:

> In all foreclosure actions the sheriff or other officer directed to sell mortgaged premises shall make such sale and report thereof and execute such conveyance as the court shall order and direct.

Id.

19 N.J. CT. R. 4:65-5 authorizes sheriffs to sell the real estate and to convey title after the sale has occurred. The mortgagor has 10 days in which to file an objection to the sale. The mortgagor "may redeem not only during that period but also, if

If the debtor files for reorganization in bankruptcy court after a foreclosure judgment, the tapestry between bankruptcy and property law begins to unravel. Generally, there are two statutes (hereinafter "plan statutes") in the Code that permit the debtor to make a reorganization plan for debts incurred.[20] The Third Circuit has held, however, that after a foreclosure judgment, a chapter 13 debtor's right to pay the mortgagee[21] over the life of the plan perishes.[22] Conversely, the Third Circuit also has determined that a chapter 11 debtor may repay its foreclosure judgment amount over the life of its Section 1123 plan.[23]

Nonetheless, Congress expressly overruled the Third Circuit decisions.[24] Declaring the Third Circuit's decisions contrary to Bankruptcy law's "fresh start" policy, this Congress remained consistent with the policy of its predecessors.[25]

This note will begin by providing an overview of the origins of bankruptcy law in Europe and the United States. Next, the devel-

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objections are filed, at any time until entry of an order confirming the sale." *Id.* at cmt. (citing Hardyston Nat'l Bank v. Tartamella, 56 N.J. 508 (1970)). *See also* N.J. STAT. ANN. § 2A:50-4 defining redemption and stating in relevant part:

> If, after the foreclosure and sale of mortgaged premises, the person entitled to the debt shall recover a judgment in an action on the bond or note for any balance of debt, such recovery shall open the foreclosure and sale of the premises, and the person against whom the judgment has been recovered may redeem the property by paying the full amount of money for which the judgment in the foreclosure action was granted. . . .

N.J. STAT. ANN. § 2A:50-4 (West 1952).

20 These two plan statutes, 11 U.S.C. §§ 1123(a)(5) and 1322(a)(2), allow a debtor to repay debts over a three- to five-year span. *See supra* note 12 for text of statutes.

21 "Mortgagee" is defined as a "person that takes or receives a mortgage." BLACK'S LAW DICTIONARY 1012 (6th ed. 1991).

22 *See* Matter of Roach, 824 F.2d 1370 (3d Cir. 1987); First Nat'l Fidelity Corp. v. Perry, 945 F.2d 61 (3d Cir. 1991). In *Roach*, the court looked to the statutory language of § 1322, deciding that when Congress intends to preempt state law, it does so explicitly. *Roach*, 824 F.2d at 1373. Therefore, because § 1322 contains no such language, state law should prevail. *Id.* Applying New Jersey's merger doctrine to § 1322, the Third Circuit decided that a debtor's plan cannot provide for the mortgage debt in a reorganization plan after there has been a full acceleration of the mortgage debt, a court has granted a foreclosure judgment, and there has been a sheriff's sale. *Id.* at 1379. Similarly, *Perry* extended the *Roach* holding, based on the *Roach* analysis, so that a debtor's ability to provide for the mortgage debt in a plan expires before a sale. *Perry*, 945 F.2d at 63.

23 Midlantic Nat'l Bank v. De Seno, 17 F.3d 642 (3rd Cir. 1994).

24 *See infra* section V. of this note discussing amendments to §§ 1123 and 1322.

25 *See infra* note 101 discussing Congress' "fresh start" policy.

opment of the plan statutes will be discussed, as well as amendments thereto since their passage. This note will then review New Jersey property law and will discuss interpretations of this law in a federal bankruptcy proceeding. Finally, the 1994 Bankruptcy Code Amendments overruling the Third Circuit decisions will be examined.

II. The Origins of Bankruptcy Law

Most ancient societies had no bankruptcy law because no credit systems existed. All bartering occurred on an immediate-payment basis.[26] However, as society changed, bankruptcy law developed.[27] The evolution of early bankruptcy law had two common principles: the division of the debtor's property between creditors and the prevention of a debtor from further detrimenting his creditors.[28]

Historians attribute the first bankruptcy laws to Roman Law in 118 B.C.[29] Early Italian government also established bankruptcy

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26 Louis Edward Levinthal, *The Early History of Bankruptcy Law*, 66 U. PA. L. REV. 223, 228-29 (1917). In these ancient societies, indebtedness was an anomaly, a deviation from normal trading practices. *Id.* at 229.

27 *Id.* at 229. "By force of economic necessity, suspension of payment was gradually introduced. . . ." *Id.*

28 *Id.* at 225. "In other words, Bankruptcy Law sought to protect the creditors, first, from one another, and, secondly, from their debtor." *Id.* Although these two principles pervaded all early bankruptcy law, some early law also embraced a third principle. This policy was to provide the honest debtor protection from his creditors. *Id.*

29 Vern Countryman, *Bankruptcy and the Individual Debtor—And a Modest Proposal to Return to the Seventeenth Century*, 32 CATH. U. L. REV. 809 (1983). *But see* Levinthal, *supra* note 26, at 230 (noting that provisions in the Hammurabic Code provided for the enslavement of debtors). Debtor treatment before bankruptcy law existed included killing, enslaving, imprisoning, or exiling debtors. Roman law also permitted creditors to enslave debtors but provided specific guidelines to creditors on how to maintain their debtor slaves. Countryman, *supra* at 809. For example, once a court adjudged an individual the debtor of another, the adjudged creditor could place chains upon the enslaved debtor to prevent escape. *Id.* at 810. However, the debtor's chains could not be "of more than fifteen pounds weight" and the creditor had to "give him a pound of grain every day. . . ." *Id.* Roman creditors whose debts went unpaid after the division of the debtor's estate could seek a harsher remedy: cutting the debtor's body into pieces. Rhett Frimet, *The Birth Of Bankruptcy in The United States*, 96 COM. L. J. 160, 161 (1991).

Roman creditors, as well as their European counterparts until recently, perpetuated the tradition of seizing the debtor's corpse to force the debtor's relations to pay the debt. Countryman, *supra* at 810. Today, California still retains a law that prohibits such treatment. *Id.* at n.5.

laws, but only for merchant debtors.[30] In addition, creditor remedies often were tied to religion.[31] While creditor remedies usually meant death or slavery for the debtor, there was an early attempt to distinguish between the "honest" and the "fraudulent" debtor.[32] Early Semitic laws provided debtors less fatal yet equally harsh remedies.[33] Additionally, Germanic law distinguished between seizing the debtor and seizing the debtor's property.[34]

In the Middle Ages, taking punitive actions against the debtor's person again became popular.[35] Italian law presumed debtors were frauds and permitted torture until the debtor confessed that he had hidden property from creditors.[36] In Lyon, the trading capital of France, a debtor could be killed by strangulation if he refused to disclose all of his possessions to creditors.[37] Furthermore, Dutch law prohibited debtors from leaving the country and would punish them for doing so even if they repaid their debts while abroad.[38]

Although all the laws mentioned above laid the foundation for

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30 *See* Countryman, *supra* note 29, at 810. The word bankruptcy comes from the latin word, first used in Italy, *banca rotta*, or "broken bench," connoting the division of the debtor's workbench and parcelling it out to satisfy creditors. *Id.*

31 *See* Levinthal, *supra* note 26, at 229. In ancient Ireland, for example, a creditor "fasted on" his debtor. If an individual defaulted on payment of a debt, the creditor would sit at his door, refusing to eat. If the creditor went unpaid, the debtor would be morally responsible for the creditor's death by starvation. *Id.*

32 *Id.* at 237. Although in early societies insolvency was equivalent to fraudulence, some early societies began to believe that an individual could simply experience "hard times." *Id.*

33 *See* Frimet, *supra* note 29, at 162. Like other early laws, Jewish law liquidated the debtor's estate. However, it permitted a debtor to avoid excommunication if he gave up all his assets to creditors and took an oath that he had no other assets. The Jewish debtor was allowed some exemptions but had to apply future earnings to debt repayment. *Id.*

34 Levinthal, *supra* note 26, at 232. As early Germanic and Jewish law evolved, their governments began to regard the debtor's property as "a pledge or security for the debt." *Id.* Thus, to collect on his debts, a creditor could seize any portion of the debtor's property. *Id.*

35 *Id.* at 241. During this period, "[e]xecution directed against the person of the debtor became prevalent once more." *Id.*

36 *Id.* at 243-44. Although Italy harshly treated the debtor because it presumed him a fraud, a creditor's fraudulent act incurred less severe punishment. If a creditor attempted to claim more payment than the actual debt owed him, that creditor relinquished his entire claim yet received no further punishment. *Id.*

37 *Id.* at 245.

38 *Id.* at 246. Additionally, persons who helped the debtor escape would be responsible for repaying all his debts. *Id.*

bankruptcy law, it is early English law that heavily influenced modern American law. In 1542, under Henry VIII, England enacted its first bankruptcy law.[39] English courts shaped bankruptcy law to foster the creditor's ability to collect its debt.[40] Remedies abounded for the creditor, affording him any opportunity to exact payment for a debt.[41] Consequently, early bankruptcy law disregarded the possibility of aiding the debtor and ignored related policy concerns that such aid would promote.[42]

Queen Elizabeth I, who felt no more sympathy towards debtors than did her father, Henry VIII, enacted another debtor law in 1570.[43] Under that law, the debtor's estate was never free from awaiting creditors because any property acquired by the debtor would immediately be seized and distributed to unpaid creditors.[44] Creditors were charged with seizing the debtor's assets once ac-

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39 *See* Louis Edward Levinthal, *The Early History of English Bankruptcy*, 67 U. PA. L. REV. 1 (1917). Although this statute dealt with debtors, "it is in fact little more than a criminal statute directed against men who indulged in very prodigal expenditures and then made off." *Id.*

40 *See* Paula A. Franzese, *Secured Financing's Uneasy Place in Bankruptcy: Claims for Interest in Chapter 11*, 19 HOFSTRA L. REV. 1, 12 (1993). *See also* Levinthal, *supra* note 39, at 1. Typically, 16th-century English debtors were merchants. *Id.* at 3. Prior to the 1066 Norman Conquest, market practices as well as merchant debt defaults were handled by local tribunals. However, with the Crusades beginning in the 12th century, English trade custom "hardened into a cosmopolitan law." Levinthal, *supra* note 39, at 1. After recognizing Merchant Law, the Crown also recognized the existence of Merchant Law courts. *Id.* at 4. Although historians' views conflict, some believe that bankruptcy law was part of Merchant Law. *Id.* at 5.

41 *See* Franzese, *supra* note 40, at 11. Early English bankruptcy statutes allowed creditors to sue the debtor at any time. Furthermore, these early statutes compelled creditors to aggregate their interests to parcel out the debtor's assets. *Id.* at 12. Finally, early bankruptcy provisions permitted courts to recognize each individual creditor's interest by prohibiting one creditor from receiving more debtor assets to the detriment of others. *Id.*

There was only one way for the debtor to seek governmental protection: through the King. Levinthal, *supra* note 39, at 10. If a debtor were lucky enough to gain the King's favor, he would receive Royal aid. The King would provide the debtor with a letter, enabling him to move about freely and beyond any vengeful creditor's reach. Parliament fought heartily to abolish this royal prerogative. *Id.*

42 Levinthal, *supra* note 39, at 4. The Crown protected creditors exclusively because this effectively protected commerce—and the King's economic interests. Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L. J. 325, 327 (1991). Thus, "the only policy issue . . . was whether the existing means for assisting creditors in collecting their debts was satisfactory." *Id.*

43 Levinthal, *supra* note 39, at 16. Like its 1542 predecessor, this law was really nothing more than a criminal statute punishing the debtor. *Id.*

44 *See* Tabb, *supra* note 42, at 332-33.

quired,[45] a duty that they were undoubtedly eager to perform.

Not satisfied with treating the debtor as a criminal, Parliament, under the reign of James I, enacted a more severe provision.[46] Specifically, a debtor could be put in a pillory[47] and have his ear cut off if he could not sufficiently prove that he was an honest but unfortunate debtor.[48] Additionally, a debtor was subject to governmental examination,[49] which could then lead to the debtor's imprisonment.[50] It was not until the 18th century, during Queen Anne's reign, that the English government enacted a somewhat pro-debtor statute.[51] Under this provision, a debtor who surrendered all his assets honestly could discharge his remaining debts.[52] Although this provision was the first to provide debtor discharge,[53] the name of the Act suggests that the English government was far from protective of debtors.[54]

Colonial American law mirrored its English predecessor.[55] In

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45 Levinthal, *supra* note 39, at 17. The creditors received direct authority under the Crown to oversee and parcel out the debtor's estate. No formal court procedure was necessary. *Id.*

46 *Id.*

47 A "pillory" is defined as "a wooden frame for public punishment having holes in which the head and hands can be locked." THE MERRIAM-WEBSTER DICTIONARY 527 (1st ed. 1974).

48 Levinthal, *supra* note 39, at 17.

49 *Id.* at 18. Crown commissioners performed these "examinations" by inquiring into the "conduct of [the debtor's] affairs." *Id.*

50 *Id.* The commissioners obtained broad authority to treat debtors harshly because, it was thought, "[t]he practices of bankrupts . . . were so secret and so subtle that they could hardly be found out or brought to light." *Id.*

51 *See* Tabb, *supra* note 42, at 333. This pro-debtor English statute was known as 4 Anne, c. 17 (1705), and is also sometimes cited as 4 Anne, c. 4 (1705). *Id.* n.45.

52 *See* Countryman, *supra* note 29, at 812. If the debtor complied with this requirement, the Crown would release him from prison. However, if the bankrupt refused to "honestly surrender his property or disclose his affairs," the Crown would then deem him a "fraudulent" debtor and a felon. *Id.*

53 Tabb, *supra* note 42, at 333. This Act also permitted debtors to receive a monetary allowance from the debtor's estate. *Id.* at 334.

54 *Id.* at 337. The Act was entitled, "An act to prevent frauds frequently committed by bankrupts." *Id.* Additionally, the Act contained two restrictions: First, it was only for merchant debtors. *Id.* at 334. Second, the amount of debt a debtor could discharge was involuntary, as only the creditor who had forced the debtor into bankruptcy could discharge the debt. *Id.* at 336.

55 *Id.* at 326. "Clearly the first United States bankruptcy law was derived from the existing English mode." *Id.* Although bankruptcy was included in the U.S. Constitution, it was not discussed at the Constitutional Convention until the end of the meeting. Frimet, *supra* note 29, at 164. It was not until John Rutledge, later a Supreme Court Chief Justice, had raised the issue late in the proceedings that the Convention

1800, America enacted its first bankruptcy law, containing no debtor remedies.[56] It was not until 1841[57] that the United States passed legislation including pro-debtor remedies.[58] In 1867, Congress passed its third major piece of bankruptcy legislation.[59] While these acts provided remedial economic legislation, they were piecemeal at best.

Thereafter, in 1898, Congress enacted its first comprehensive[60] piece of bankruptcy legislation, referred hereafter as "the 1898 Act." Rather than forcing debtors to repay each creditor's full interests, the 1898 Act allowed debtors to discharge their debts.[61] Concurrent with the evolution of bankruptcy laws that were benevolent to debtors, Congress continued the English bankruptcy law policy of recompensing creditors.[62] Thus, American

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voted on whether "to establish uniform laws on the subject of bankruptcies." *Id.* All Convention members were in favor of this language, except for Roger Sherman. He feared that because bankruptcy was, in some cases, punishable by death in England, the same would occur in America if the Constitution provided this authority. *Id.*

56 *See* Countryman, *supra* note 29, at 813. Congress enacted this law following an economic panic that was of short duration, leading to the law's repeal in 1803. Similar to the Queen Anne's 1705 Act, this act was for merchant debtors and was involuntary. *Id.* Also, it permitted debtors to keep some necessaries, such as clothing, from their estates. *Id.*

57 Frimet, *supra* note 29, at 175-76. Congress enacted this legislation after the "Great Panic of 1837." Contemporary commentators adjudged this economic depression the worst that the United States had known. Consequently, Daniel Webster introduced legislation that would permit voluntary bankruptcy for *all* persons owing debts. *Id.* at 177 (emphasis added). Not only was this the first time that Congress opened bankruptcy laws to non-merchants, it was also the first voluntary proceeding. Countryman, *supra* note 29, at 815. Congress repealed this Act in 1843. *Id.* at 814.

58 Countryman, *supra* note 29, at 814. Prior to 1841, however, states individually dealt with the issue of debtor imprisonment. In 1830, four states, Massachusetts, Maryland, New York, and Pennsylvania, held twice as many debtors in their prisons as criminals. *Id.* Consequently, in the 1830's, Congress enacted legislation forbidding states from imprisoning debtors. *Id.* "Today, such prohibitions appear in the constitutions of most states and in the statutes of several where the constitutions are silent." *Id.*

59 *Id.* at 815. This Act, too, came after an economically depressed period. *Id.*

60 1898 Act, Ch. IX, sec. 91; Ch. X, sec. 216; Ch. XI, sec. 363; Ch. XIII, sec. 653. Since 1898, the United States always has had comprehensive laws on bankruptcy. *Id.* at 817.

61 *See* Franzese, *supra* note 40, at 13. There was a conspicuous change by the end of the century from a body of law created solely for the purpose of debt collection and debtor liquidation, to significant debtor protection. This act allowed debtors the additional remedy of keeping property exempt from the debtor's estate under federal nonbankruptcy and state laws. Countryman, *supra* note 29, at 817.

62 H.R. Doc. No. 137, 93d Cong., 1st Sess., at 63 (1973) [hereinafter *Comm'n Rep.*]. The 1898 Act represented an amalgamation, beginning with the "introduction of dis-

bankruptcy law developed two apparently conflicting goals: creditor repayment and debtor protection.

In 1938, the Chandler Amendment[63] furthered the Bankruptcy Act's debtor-benevolent policy by allowing debtors the option to reorganize rather than liquidate.[64] These chapters contained procedural guidelines for consumer and business debtor reorganization, and these chapters allowed debtors to maintain hope of future financial viability.[65] Thus, in fifty years American bankruptcy law had greatly modified the previous harsh results to debtors under bankruptcy law formulated by its English predecessor.

Approximately fifty years after the passage of the Chandler Act, Congress again decided that a major change in bankruptcy law was in order.[66] It concluded that drastic changes in post-war consumer credit, as well as substantial modifications in business practices, mandated a reexamination of bankruptcy law.[67]

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charge relief in the Act of 1841, of two separate trends, retaliatory action and cooperative action." *Id.* The 1898 Act kept the retaliatory action rooted in Roman law. However, it further developed the antecedents of cooperative policies within bankruptcy laws that began in England with "insolvency laws" and focused on a way for the "unfortunate debtor" to apportion his assets to creditors. *Id.* The debtor divided assets by either entering into an agreement with them or assigning his property rights to the creditors in trust. Early Supreme Court decisions noted Congress' apparent policy in their opinions. *See, e.g.*, Local Loan Co. v. Hunt, 292 U.S. 234 (1934). In this case, the Court articulated the policy it inferred from the 1898 Act as allowing the "honest but unfortunate debtor" a new opportunity for a "clear field for future [economic] efforts." *Id.* at 244.

63 Chandler Act, ch. 575 §§ 101-276, 52 Stat. 840, 883-905 (1938) (codified in part in scattered sections of 11 U.S.C.). *See* Franzese, *supra* note 40, at 13. The 1898 Act, while allowing debtors to discharge their debts, did not provide for debtor reorganization. Instead, it merely directed debtor liquidation. The Chandler Act was the first legislation that divided debtors into specific groups by creating a chapter XIII, Wage Earner's Plan. Countryman, *supra* note 29, at 818.

64 *Id.*

65 *See* Countryman, *supra* note 29, at 818. This chapter allowed individual debtors the option of liquidation or reorganization. Additionally, the Chandler Amendment was the first legislation to provide for shipping bankruptcies. Graydon S. Staring, *Admiralty Law Institute Symposium on Bankruptcy v. Maritime Rights*, 59 TULANE L. REV. 1157, 1163 (1985).

66 *See Comm'n Rep.*, *supra* note 62, at 1.

67 *Id.* Public Law 91-354 established the Commission on Bankruptcy Laws to "study, analyze, evaluate, and recommend changes" in the Bankruptcy Act. *Id.* Congress' articulated purposes for forming the Commission were fourfold:

> (1) the increase in the number of bankruptcies by more than 1,000 percent in the preceding twenty years; (2) the widespread feeling among referees in bankruptcy that problems of administration required substan-

Consequently, in 1973 Congress assembled a Commission on Bankruptcy[68] for the purpose of revamping current bankruptcy law.[69] It is from the Commission's reports and hearings that the plan provisions, Section 1123 in chapter 11 and Section 1322 in chapter 13, first developed.[70]

III. Legislative History

A. *The Development of the Plan Statutes*

The Commission on Bankruptcy did not set forth in statutory structure the plan statutes that Congress eventually adopted in 1978. However, the Commission's report did outline a number of suggestions regarding concepts of what the plan statutes should contain.[71] Significantly, interspersed throughout the Report is the Commission's recommendations regarding a debtor's plan and how it affects the debtor's property.[72]

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tial improvement in the Act; (3) the impact of the operation of the Act with the vast expansion of credit; (4) the limited experience and understanding in the Federal Government and nations' commercial community in assessing the operation of the Bankruptcy Act.

Id.

68 *Id.* In 1973, Congress appointed a Commission to review and report on necessary changes to bankruptcy laws. The Commission includes: Harold Marsh, Chairman; Professor Charles Seligso; J. Wilson Newman; Honorable Quentin N. Burdick (S-ND); Honorable Marlow W. Cook (S-KY); Honorable Don Edwards; Honorable Charles E. Wiggins (Rep.-CA); Honorable Edward Weinfeld (U.S. Dist. Judge S.D.N.Y.); Honorable Hubert L. Will (U.S. Dist. Judge N.D. Ill). *Id.* at v. The Commission met for 21 days and held four public hearings. *Id.* at vi. Prior to these hearings, the Commission published in local and national news services the location of the meeting to extend an open invitation to anyone interested in speaking. Additionally, the Commission circulated questionnaires to more than 100 individuals and businesses to obtain a variety of input. *Id.*

69 *Id.* at 1. The Commission's stated purpose was to revise existing bankruptcy law. More specifically, because of the rapid growth rate of the consumer credit industry, as well as post-war business expansion, the Commission's expressed purpose was to recommend changes in existing bankruptcy law that more accurately corresponded with these economic changes. *Id.* at 2.

70 *See supra* note 12 for text of statutes.

71 *Comm'n Rep., supra* note 62, at 42. Significantly, one objective of the plan statutes was to create uniformity in bankruptcy law by adding the "notwithstanding any other law to the contrary" clause which Congress eventually incorporated into § 1322 but not into § 1123. *See also infra* Section III. B. of this note discussing the meaning of this clause.

72 *Comm'n Rep., supra* note 62, at 13. For example, the Report notes that Chapter XIII under the 1898 Act did not deal adequately with secured claims in real property. *Id.*

In offering suggestions for a "wage-earner's" plan,[73] the Commission articulated the inability of existing laws to cover claims secured in real property.[74] Recognizing this deficiency, the Commission suggested measures for a remedy.[75] Furthermore, the Commission exhorted modifications in the plan statutes for business debtors.[76] Regarding the real property portion of the debtor's estate, the Commission noted that courts were deferential to foreclosure judgments entered prior to declaring bankruptcy under the 1898 Act.[77] The Commission's report was the first step toward what would be the long road to bankruptcy reform.[78]

In the House of Representatives, after the Commission delivered its report, the Chairman and Ranking Minority Member of

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[73] Congress eventually enacted a "wage-earner's" plan but renamed it as a plan for "individuals with regular income." *See supra* notes 5 and 6 and accompanying text.

[74] *See Comm'n Rep., supra* note 62, at 13. Because the 1898 Act did not provide for real property claims, debtors could not provide for payments or discharge mortgage indebtedness within the context of the plan. *Id.*

[75] *Id.* To deal with real property problems, the Commission recommended the enactment of a plan statute that would allow debtors to pay residential lien debts over the life of the plan, curing any defaults within a reasonable time. *Id.* at 13. Additionally, the report advised permitting debtors to include within the plan repayment provisions to creditors with an interest in the debtor's real property that would protect this interest but without affording creditors veto power over the plan. *Id.*

[76] *Id.* at 14.

[77] *Id.* at 17. The Commission further stated that bankruptcy courts typically cannot prevent the continuation of foreclosure proceedings initiated before the commencement of a liquidation case under the Act. Here, the Commission is outlining a *Roach*-type case under the future chapter 11, but under liquidation provisions. Regarding plans for reorganization after a foreclosure, the Commission suggested that bankruptcy courts should either enforce a lien against the property or invoke an automatic stay against any state action that would affect the debtor's property while the bankruptcy matter is pending. *Id.* Thus, the Commission came close but stopped short of formulating an answer to the *Roach/Perry* issue.

[78] The National Conferences of Bankruptcy Judges disagreed with much of the Commission's proposed changes. S. REP. No. 95-989, 95th Cong., 1st Sess. 2 (1977) [hereinafter *Senate Rep.*]. Accordingly, the Bankruptcy Judges drafted their own report, which Congressmen Edwards and Wiggins introduced as H.R. 16643. *Id.* Although the Commission and Bankruptcy Judges' reports differed in many areas, the only disparity between the two reports pertaining to the plan statutes was with individual debtors. H.R. 32, 94th Cong., 1st and 2d Sess. (1976) [hereinafer H.R. 32]. Unlike the Commission Report, in the Bankruptcy Judge's report the proposed chapter 13 plan provision made it unnecessary for a debtor to make a payment under an acceleration clause to cure a default on a mortgage. H.R. 32 at 212. While both the Commission and the Bankruptcy Judges' reports were pending in the House, the Judiciary Committee, the Subcommittee on Civil and Constitutional Rights of Judiciary Committee, conducted extensive hearings on both bills. *Senate Rep., supra* at 2. Consequently, the two bills merged into H.R. 6, 95th Cong., 1st Sess. (1977). *Id.*

the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary introduced the new bankruptcy reform bill.[79] After a lengthy markup in the Judiciary Committee, the bill was renamed H.R. 8200.[80] In addition to its name change, the bill underwent changes after its inception. The Judiciary Committee submitted a report outlining these changes.[81] In the Report's introduction, the Committee reiterated the need for reform in bankruptcy law.[82]

Within its reorganization proposals, the Committee reaffirmed much of the existing bankruptcy law, although it simultaneously formulated new provisions. When modifying the plan provisions, the Committee summarized its main objectives.[83] One objective was to provide flexibility in specific plan statutes for consumer debtors.[84] Significantly, the Committee Report contemplated concerns about long-term debts, such as mortgage debts.[85] However, the Report lacked foresight, omitting any depiction of a mortgagee's rights after a foreclosure judgment.[86] Instead, the House Committee Report, remaining consistent with other sections of the proposed Bankruptcy Code, allowed consumer debtors great lee-

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79 HOUSE REP., TO ACCOMPANY H.R. 8200, H. REP. No. 95-595, 95th Cong., 1st Sess. (1977) [hereinafter *House Rep.*]. Chairman Don Edwards and Ranking Minority Member M. Caldwell Butler introduced H.R. 6 (later renamed H.R. 8200) entitled "A Bill To Establish A Uniform Law On The Subject Of Bankruptcies" on January 4, 1977.

80 H.R. 8200, 95th Cong., 1st Sess. (1977) [hereinafter H.R. 8200].

81 *Id.* The House of Representatives Rules of Procedure mandate that a Committee submit an explanatory report with a favorable bill report. In its introduction, the Committee outlined the dual purposes of the report: (1) to provide insight to House Members who were unacquainted with the existing bankruptcy laws, and to explain why changes in these laws were necessary and how the new Code planned to realize them; and (2) to aid courts in their attempt to ascertain the legislative intent behind the bill. *Id.*

82 *House Rep., supra* note 79, at 3. Like the Commission, the Committee emphasized the need for bankruptcy reform because of growth in the consumer industry as well as the states' considerable adoption of the Uniform Commercial Code. *Id.*

83 The Committee expressed the great flexibility that debtors would enjoy under the bill. *Id.* at 123. Additionally, the report allowed debtors the freedom to classify and modify any claims except "priority" claims; specifically, administrative costs and taxes. *Id.*

84 *Id.* The proposed § 1322 permitted debtors to classify creditors and modify their claims. Additionally, the provision allowed debtors to cure or waive any default. *Id.*

85 *Id.* at 429 (outlining proposed § 1322(5)).

86 *House Rep., supra* note 79, at 429.

way under the plan.[87] Similarly, under the proposed chapter 11 provisions, the Committee failed to define a mortgagee-creditor's rights following a foreclosure judgment.[88] Once again, the Committee's only requirement under proposed Section 1123 was that business debtors submit plans compatible with the Code's provisions.[89] Thus, the House Committee Reports failed to anticipate the problem that arises when a foreclosure judgment precedes a debtor's bankruptcy petition.

The Senate Committee Report, compiled after the House Report, contained information similar to the House Report yet provided less detail.[90] Calling for a revamping of the consumer debtor's chapter, the Senate report acknowledged the need for a more comprehensive consumer chapter.[91] Significantly, the Senate Report added a clause to proposed Section 1322(b)(2) that proscribed the modification of creditor's rights secured solely by real estate mortgages.[92] The Committee added this clause, which had been excluded from the House Report, to protect the home mortgage industry.[93] Within the business context, however, the

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[87] *Id.* Under paragraph (5), the debtor was permitted to devise any plan not inconsistent with the bankruptcy code. *Id.*

[88] *Id.* at 407.

[89] However, under this section, the report permits business debtors the opportunity of "satisfaction or modification of any lien." *Id.* at 407. This language is omitted from the proposed § 1322. *Id.* at 429. Surprisingly, the opposite is true with the statutes in their enacted form: the chapter 13 plan provision contains "satisfaction or modification of any lien" language while the chapter 11 provision lacks this language. 11 U.S.C. §§ 1123 and 1322 (1978). *See supra* note 12 for the text of §§ 1322 and 1123.

[90] Because much of the Senate Judiciary Committee reports are similar to the House Judiciary Committee reports, the Senate report omitted much of the detail in its House counterpart. REPORT OF THE COMM. ON THE JUD. TO ACCOMPANY S. 2266, S. 2266 95th Cong., 2d Sess. (1978) [hereinafter *Senate Rep. to S. 8200*]. Additionally, the Senate went through a procedure identical to that in the House. *See* S. 235 and S. 236, 94th Cong. 2d Sess. (1975). Like the House, the Senate heard testimony about the bills corresponding to the Commission and Bankruptcy Judiciary Committee's report. *Senate Rep. to S. 8200, supra,* at 2. Consequently, on November 1, 1977 Senators DeConcini and Wallop introduced S. 2266 to correspond with the H.R. 8200. *Id.*

[91] *Senate Rep. to S. 8200, supra* note 90, at 12. The report noted that although consumer debtor provisions had been in effect since the 1938 Chandler Amendment, the practical implication of those statutes yielded unsatisfactory results. Mindful of creditor losses that existed under consumer debtor statutes, the Committee nonetheless endorsed chapter 13. *Id.*

[92] *Id.* at 141.

[93] *See* HEARINGS BEFORE THE SEN. COMM. ON JUD. MACHINERY, 95th Cong., 1st Sess. 707, 714 (1977) [hereinafter *Sen. Comm. Hearings*]. Mr. Edward J. Kulik, Senior Vice

Senate Committee report remained substantially similar to the House report.[94]

After debate among House Judiciary Committee members concerning the Report, the bill was reported favorably to the full House.[95] In their introductory form,[96] the plan statutes largely resembled Sections 1123 and 1322 as they presently exist. However, these proposed statutes would have altered significantly the outcome of mortgagee creditors had Congress enacted them.[97] More revealing than the bill itself, the House debates indicated that since the 1898 Act, Congress had modified the policy behind bankruptcy legislation to one that considers both debtor and creditor interests.[98] In a revealing session, the sponsoring Representatives stipulated their impetus for drafting the bill.[99] Specifically,

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President of the Real Estate Division of the Massachusetts Mutual Life Insurance Company, appeared on his own behalf to testify at the Committee hearings. He expressed apprehension about proposed chapter 13 because it allowed consumer debtors to formulate a plan that could modify the rights of mortgagees and judges to confirm any such plan over a mortgagee's opposition. *Id.* at 141, 143. Mr. Kulik warned that because a mortgagee's rights could be extinguished under the proposed Code, it might have the unintended effect of restricting the flow of home mortgages. *Id.* at 715. Senator DeConcini then challenged Mr. Kulik, questioning the actual impact on consumer mortgages. At that point, Mr. Robert E. O'Malley, a lawyer who had accompanied Mr. Kulik, proposed that the consumer plan statute should contain an exception for creditors whose sole claim rested in the debtor's home. *Id.*

See also In re Glenn, 760 F.2d 1428, 1433 (6th Cir. 1985) (explaining that although the mortgagee exception in § 1322 appears to contradict the Code's policy, Congress intended to allow favored status to home mortgage lenders because of the negative effect the industry would endure without this exception); *In re* Strober, 136 B.R. 614 (Bankr. E.D.N.Y. 1992) (finding Congress meant to except home mortgagees from the modification provision in § 1322); *In re* Seel, 22 B.R. 692 (Bankr. D. Kan. 1982) (stating reason for § 1322(b)(2) exception to home mortgagees was to provide stability within the home mortgage industry).

94 *See Senate Rep. to S. 8200, supra* note 90, at 118-20.

95 5 COLLIER ON BANKR. (15th ed.) app. (3), at III-1. The House Judiciary Committee reported the bill to the full House on September 8, 1977. *Id.*

96 H.R. 8200, *supra* note 80. Mr. Edwards, Mr. Butler, Mr. Seiberling, Mr. Deinan, Mr. Volkmer, Mr. Beilenson, and Mr. McClory introduced H.R. 8200.

97 *Id.* at 497. However, the title of § 1123, which states "a plan shall—" excludes any reference to nonbankruptcy law. *See also infra* Section III. C. of this note, discussing the 1984 "notwithstanding any nonbankruptcy law" amendment.

98 124 CONG. REC. H11047 (daily eds. Sept. 27th, 28th, Feb. 1st, 1978). The debates on H.R. 8200 occurred on October 27 and 28, 1977 and February 1, 1978. *Id.*

99 *Id.* at H35444. Congressman Rodino specified that the bill was supposed to be neither pro-debtor nor pro-creditor. Reiterating, Representative McClory noted that regardless of one's political philosophy, the members of the Committee aimed toward objectivity, displaying neither a pro-debtor nor pro-creditor conviction. *Id.* at H35445.

representatives introducing the bill noted several new provisions that granted creditors new rights.[100] Additionally, the bill altered existing dischargeability laws, allowing more debtors the opportunity for a "fresh start."[101] Thus, the drafters intended to equip the

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100 *Id.* at H35446. Because bankruptcy cases had been facilitated by bankruptcy administrators who had little desire to act within the best interests of the creditors, H.R. 8200 proposed the trustee system whereby a more involved officer would oversee the debtor's estate. *Id.*

101 *Id.* From the Commission's report, the Judiciary Committee became aware of the loopholes in the dischargeability statutes and sought to remove them, particularly within the consumer debtor spectrum. Moreover, the Committee proposed a consolidation of the three reorganization chapters into the two that now exist to clarify and simplify the Code.

The "fresh start" policy that Congress advocated in the Code reform appears necessary for consumer debtors to recover not only financially, but also psychologically. Recent reports demonstrate the psychological effects that filing bankruptcy has on debtors. Jennifer Driscoll, *Gone Bust*, ST. PAUL MAGAZINE, Oct. 1993, at 1. For example, "John," a certified public accountant in the Twin Cities, recently filed a petition in bankruptcy court. *Id.* "'I lost a lot of money on my real-estate investment,' he says. 'Then a balloon payment on my home mortgage came due, and I couldn't refinance it because of my real-estate problem.'" *Id.* John describes the day his Chapter 7 filing was published in a local newspaper: "'I felt everyone was looking at me as I walked down the street. . . . I laid low for awhile and worked out of my home. I only told my wife.'" *Id.* Although John again became financially solvent, he has been unable to forgive himself. *Id.* at 2. He describes the effects the bankruptcy has had on his personal life: "John says it hurt him to see how hard the bankruptcy was on his wife. 'It hurt her trust in my decision making,' he says. 'She used to think I could pull anything off. Now she questions my judgment. That's hard on our marriage.'" *Id.*

Others have had similar experiences. Molly, a 55-year-old waitress, fell into debt when she was hospitalized for a heart attack. *Id.* at 3. Her job offered her no insurance yet she could not receive public assistance because she was employed. *Id.* Another debtor, Marilyn, describes the emotions she felt after filing in bankruptcy court: "'When you file, you feel like a failure, ashamed, like something's wrong with you. . . . I learned that bad things don't happen to somebody else; they happen to me. I have a lot of empathy for people with financial problems now.'" *Id.* at 4.

Attorney Jack Prescott believes credit cards are the primary cause of consumer bankruptcy. *Id.* at 3. Another attorney describes the humiliation creditors often inflict on debtors: They think the more miserable they make you, the more likely you'll pay them. It's that squeaky-wheel-gets-the-grease mentality, and perhaps the creditors are right. But their verbal abuse, including suggestions of dishonesty, takes its toll on a debtor's self-esteem. If you ask them to stop calling you at home, they may take legal action and force you into bankruptcy. *Id.* at 4. *But see* FORBES MAGAZINE (1991) (poll indicating that 78% of Americans believe it is presently more socially acceptable to file bankruptcy now than in past years).

See also Larry Green, *Fraud Schemes Farm Woes Attracting Con Artists*, L.A. TIMES, Oct. 10, 1986, at A1. Although the Bankruptcy Code deals with farm debtors under Chapter 12, family farmers also face many of the psychological effects of bankruptcy that individuals face. One Iowa couple pledged $67,000 to a California man promising to alleviate their financial distress, including keeping their family farm. However,

new Bankruptcy Code with ammunition that both debtors and creditors could utilize in bankruptcy court.

The Senate's version of H.R. 8200, S. 2266, also appeared to allow new liberties to both debtors and creditors. In the business context, S. 2266 contained a provision that, remarkably, would have preempted the foreclosure problem that the Third Circuit and New Jersey district and bankruptcy courts face today.[102] Although it is difficult to predict, the enactment of the Senate bill as originally drafted probably would have guided courts, allowing them to confirm a plan that reinstates a mortgage within a chapter 11 reorganization plan. Adopting the Senate Judiciary Committee's Section 1322 proposal, S. 2266 provided consumer debtor mortgagees the right to retain an unmodified interest in a debtor's home.[103] The Senate debate, concerned largely with the right to reaffirm a debt,[104] did nothing to alter the plan statutes formulated in S. 2266.[105]

After Congress debated their bills, the floor managers in both the House and the Senate met and drafted a compromise bill.[106] They prepared a joint statement explaining the compromises between the House and Senate bills. Detailing these compromises, the joint statement clarified ambiguities within the bill and explained language differences between the House and Senate versions of it.[107] The plan statutes appear quite similar to their

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after taking their money, Eugene P. Allen disappeared, leaving the farming couple with a feeling "very much like being raped." *Id.*

102 S. 2266, 95th Cong., 2d Sess. 539 [hereinafter S. 2266]. Notably, S. 2266 contained a provision not found in the House version. S. 2266 contained an extra provision, § 1131, entitled "Real Estate Liens," which, had it been enacted, would have allowed debtors with a lien on real property to modify that lien and reinstate it, *regardless of otherwise applicable law*, over the life of the plan. *Id.* However, the Senate expressly limited this provision to business debtors. *Id.*

103 S. 2266, *supra* note 102, § 1322(b)(2). Unlike H. 8200, S. 2266 contains a separate parenthetical allowing consumer mortgagees to retain, unmodified, their interest in the debtor's home. This statement is similar to the enacted § 1322(b)(2). *See supra* note 12 for text of enacted statute.

104 124 CONG. REC. S14723 (daily ed. Sept. 7, 1978). A proposed amendment to § 524(b) and (c) prohibited consumer debtors from reaffirming a debt once discharged. During the debate over S. 2266, some Senators were fearful that this amendment would cause a bankrupt to lose his or her home. *Id.* However, this debate did not spill over to debate about § 1322. *Id.*

105 *Id.*

106 124 CONG. REC. H11047 (daily ed. Sept. 28, 1978).

107 *Id.*

eventually-enacted form,[108] yet some of the many revisions in both H.R. 8200 and S. 2266 effected the plan statutes.[109]

Finally, both the House of Representative and the Senate debated once more.[110] Their final statements reiterated the underlying purpose and need for new bankruptcy legislation.[111] For the

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[108] *Id.* at H11076. At this point, § 1322(b)(2) contains the home mortgagee's exception not stated in H.R. 8200. Notably, the statement expressly declares that any claim which is solely in the debtor's principal residence should be dealt with under § 1322(b)(5) of the House amendment. *Id.*

[109] *Id.* The compromise version deleted § 1131 of S. 2266. The statement notes this section's omission and stated that it was unnecessary because of the protection that mortgagees would receive under § 1129(b). *Id.* Section 1129(b) does allow creditors to maintain a lien interest and implies that payments to this secured interest may be paid over the life of the plan. *Id.* In its enacted form, § 1129(b) reads—

> (b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interest that is impaired under, and has not accepted the plan.
>
> (2) For the purpose of this subsection, the condition that a plan be fair and equitable includes the following requirements:
>
> (A) With respect to a class of secured claims, the plan provides
>
> (i) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and
>
> (ii) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property. . . .

11 U.S.C. § 1129 (1978). Thus, § 1129(b) contains no specific provision expressly allowing debtors to provide for mortgage payments over the life of the plan, regardless of nonbankruptcy law, as did § 1131. *Cf.* S. 2266 *with* § 1131; 11 U.S.C. § 1129(b).

[110] 124 CONG. REC. H11864-66 (daily ed. Oct. 6, 1978).

[111] *Id.* at S17418. The Senate debate makes clear that the business reorganization chapter, in particular, drastically needed reorganizing in the wake of the failure, under current law, of businesses to reorganize. To remedy this problem, the Senate exhorted the new legislation because it would provide speed and simplicity for both debtors and creditors. *Id.*

Although the public often is unaware, businesses, too, suffer more than financial losses when filing in bankruptcy court. Steve Bergsman, *Getting Your Fiscal House in Order,* BLACK ENTERPRISE (1992), at 1. Chester N. Watson, a certified public accountant in New York, suggests that bankruptcy should be a business's last resort because "it affects the creditworthiness of that . . . business for years." *Id.* He states that although financial recovery in one business venture is possible, filing bankruptcy has longstanding effects. If the proprietor of a failed business wishes to start a new business, "hav-

final time, the houses reviewed the revisions since the last debate.[112] Thereafter, the House and Senate passed the new Title 11 into law, providing the first overhaul in bankruptcy legislation since the 1898 Act.[113]

B. *1984 Amendment*

While Congress has enacted many amendments since the Bankruptcy Code's inception,[114] only the 1984 Bankruptcy Amendments and Federal Judgeship Act altered the plan statutes.[115] Predominantly, the purpose of this amendment was to modify the bankruptcy courts' jurisdiction in light of a Supreme Court decision that made some of their authority unconstitutional.[116] How-

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ing filed bankruptcy could be 'the kiss of death' in terms of trying to get conventional financing." *Id.*

Les Kirschbaum, president of Mid-Continent Agencies, Inc., suggests that companies can avoid bankruptcy by developing distinct internal and external working policies that promote quick cash turnover times. *Id.* at 3. He adds that "[f]or the most part, there are always alternatives a business can pursue to reorganize its financial affairs before experiencing the cost and trauma of bankruptcy." *Id. See also* Daniel Stoffman, *Some Like it Hot; Nothing Pleases Peat Marwick Receiver Gary Colter More Than Putting Out the Fires in Bankrupt Companies,* CAN. BUS., Sept. 1985, at 72 (suggesting a "new breed" of lawyers is arising with a mindset to help restructure, rather than liquidate, companies). *But see* Bergsman, *supra* at 2 (stating that only 17% of all businesses that file bankruptcy successfully reorganize).

112 124 CONG. REC. S17419 (daily ed. Oct. 6, 1978). Though making no substantial changes in § 1322, the debates noted specifically under § 1123(b)(2) that if a plan is confirmed, then any action proposed in the plan should stand unaltered notwithstanding any nonbankruptcy law. *Id.*

113 *See* U.S.C.C.A.N. 92 Stat. 2549 (1978). Congress enacted H.R. 8200 on November 6, 1978. *Id. See also* Countryman, *supra* note 29, at 819. "In the new Bankruptcy Code, Congress has abdicated its bankruptcy power to the states more than ever before." *Id.* at 819-20. Because states can now freely commingle state and federal bankruptcy law, each state now formulates its own "fresh start" policy. Consequently, there is no uniform, federal "fresh start" policy. *Id.*

114 Congress has amended the Code nearly every year since its inception: Higher Education Loan Act, H.R. 2807, 96th Cong., 1st Sess. (June 21 1979); Amendments to Internal Revenue Code to provide tax treatment of bankruptcy, insolvency, and similar proceedings, H.R. 5043, 96th Cong., 2d Sess. (1980); Omnibus Budget Reconciliation Act of 1981, 97th Cong., 1st Sess. (1981)(amending 11 U.S.C. § 523(a)(5)(A)); Technical and Substantive Changes in Bankruptcy With Respect to Securities and Commodities, H.R. 4935, 97th Cong., 2d Sess. (1982); Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act, H.R. 5316, 98th Cong., 2d Sess. (1986); Retiree Benefits Bankruptcy Protection Act of 1988, H.R. 2969, 100th Cong., 1st Sess. (1988). *See also infra,* section V., for 1994 amendments.

115 Act of July 10, 1984, Pub. L. No. 98-353, 98th Cong., 2d Sess. (1984).

116 *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). In that case, the Court decided that a bankruptcy judge could not rule on

ever, Congress relegated one amendment section for "miscellaneous" or "technical" amendments.[117] It is pursuant to this section that Congress altered § 1123, muddying the waters of the often murky legislative intent.[118]

Even though Congress categorized the § 1123 changes under the technical section, the changes proved far more onerous to decipher than Congress had perhaps initially intended.[119] The change replaced § 1123's introductory words from "[a] plan shall" to "[n]otwithstanding any otherwise applicable nonbankruptcy law, a plan shall. . . ."[120] Consequently, this "technical" change has served only to cause confusion among New Jersey's federal bankruptcy courts, leaving them little choice but to apply a *Roach*-like

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state-created rights or causes of action. *Id.* *See also* U.S.C.C.A.N., 98th Cong., 2d Sess. 92 Stat. 601 (1984); Countryman, *supra* note 29, at 821. Another fundamental reason for enacting this legislation was the change in the political climate since the 1980 elections. Because of President Reagan's pro-business policy, big business felt the time was ripe to press Congress for change. "A campaign was mounted that dwarfed all earlier efforts. Members of the industry—banks, consumer finance companies, and credit unions—banded together as the National Coalition for Bankruptcy Reform and began to beat the drums for the Bankruptcy Improvement Act." Countryman, *supra* note 29, at 822. Soon thereafter, many newspapers featured articles depicting the Bankruptcy Code as grossly unfair to consumer creditors. Newspapers stated that many consumers filed bankruptcy, even when unnecessary, because of the Code's generosity towards them. *Id.*

117 *See* Section H, Act of July 10, 1984, Pub. L. No. 98-353, 98th Cong., 2d Sess. (1984). Before its enactment, the technical amendments first were introduced as "[a]n Act to correct technical errors, clarify and make minor substantive changes to Public Law 95-598." H.R. REP. No. 1195, 96th Cong., 2d Sess. 22 (1980). This bill did not become law but an amendment providing for technical changes again was introduced in S. REP. No. 65, 98th Cong., 1st Sess. 84 (1983).

118 *In re* Public Service Co., 108 B.R. 854, 865 (Bankr. D.N.H. 1989). It is not for this reason alone that the legislative intent behind the 1984 amendment becomes difficult to decipher. In addition, there were neither committee reports nor conference reports for the 1984 Technical Amendments. *See also* Susan Block-Lieb, *Using Legislative History to Interpret Bankruptcy Statutes*, BANKR. PRAC. AND STRATEGY 2-2 (noting enigmas existing in legislative interpretations of the 1984 amendment are a result of the "push-and-shove" politics present in 1984 that were lacking during the Code's enactment process).

119 U.S.C.C.A.N., 98th Cong., 2d Sess. 1984, at 385. Though seemingly insignificant, the § 1123 revision replaced the opening language of "[a] plan shall" with the words "[n]otwithstanding any otherwise applicable nonbankruptcy law, a plan shall . . . ." *Id.* *See also* Block-Lieb, *supra* note 118, at 2-15 (noting that although Congress initially implemented the technical provisions to correct grammar and spelling mistakes, they eventually included some substantive changes).

120 U.S.C.C.A.N., *supra* note 119, at 385.

holding to chapter 11 cases.[121]

IV. The Bankruptcy Code Deciphered in Relation to New Jersey Law

A. *The Sand Within the Oyster: New Jersey Property Law*

New Jersey law presumes that a mortgage borrower has legal title to the underlying real property as well as entitlement to its full possession prior to default.[122] Upon entering into a mortgage contract, however, the mortgagor[123] accepts the possibility that he or she may lose the property upon default[124] and would then be required to pay any remaining deficiency under the mortgage contract.[125] These longstanding laws remain significant to New Jersey residents today because this state currently has the highest foreclosure rate in the nation.[126]

Typically, a mortgage contract contains an acceleration clause.[127] This provision affords the mortgagee the option to accelerate the maturity of the debt if there is either a default in the principal or the interest, or if there are any statutory liens.[128] The

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121 *See infra* note 171 and accompanying text for discussion of New Jersey Chapter 11 cases.

122 A mortgage in New Jersey "has been held to be in the nature of a 'transfer or conveyance' of the legal title from the mortgagor to the mortgagee, subject to a revesting of title in the mortgagor upon payment of the mortgage." Feldman v. Urban Commercial, Inc., 64 N.J. Super. 364, 373 (1960)(citing N.J. REV. STAT. § 16:9-1). However, the legal title a mortgagee possesses before a default does not entitle him or her to an immediate estate in land or possession of the land. *Id.*

123 "Mortgagor" is defined as "one who, having all or some part of title to property, by written instrument pledges that property for some particular purpose such as security for a debt. The party who mortgages the property; the debtor. That party to a mortgage who gives legal title or a lien to the mortgagee to secure the mortgage loan." BLACK'S LAW DICTIONARY 1012 (6th ed. 1991).

124 "Default" is defined as "a failure. An omission of that which ought to be done." *Id.* at 417.

125 *See generally* Central Penn Nat'l Bank v. Stonebridge Ltd., 448 A.2d 498 (N.J. Super. Ct. 1982)(holding mortgagee must pay entire amount of mortgage debt upon entry of foreclosure judgment).

126 News broadcast, WCBS-TV, New York, Mar. 14, 1994, 5:30 p.m.

127 GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 7.6 at 488 (2d ed. 1985). An acceleration clause is contained in the mortgage contract and empowers the mortgagee, in the event of a default, to demand immediately the full amount under the contract. Most installment payment mortgages today contain acceleration clauses and they are universally accepted. Without this clause, a mortgagee would be required to obtain a foreclosure judgment on every payment as it became past due. *Id.*

128 *Id. See also* Eisen v. Kostakos, 282 A.2d 421 (N.J. Super. Ct. 1971). The Code defines "statutory lien" as "a lien arising solely by force of a statute on specified cir-

mortgagee can demand the mortgagor's strict adherence to this clause.[129] If the mortgagor defaults, however, New Jersey equity courts long have held that a home mortgagee's rights change.[130] Courts grant mortgagees new rights while curtailing others.[131] Most importantly, once a mortgagor defaults, the mortgagee then obtains the right to a foreclosure judgment.[132]

The mortgage borrower's sole remedy after a foreclosure judgment is redemption.[133] In New Jersey, a mortgagor may exercise the right to object to the foreclosure judgment within ten days after the foreclosure judgment.[134] Although few mortgagors have the financial wherewithal to do so, equity does allow homeowners a final attempt at salvaging their homes by fully repaying the remaining mortgage debt under the redemption statute.[135] Notwithstanding a redemption, a foreclosure judgment alters significantly the nature of the previous contractual relationship between the now

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cumstances or conditions, or lien of distress for rent, whether or not statutory, but does not include security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute." 11 U.S.C. § 101(47) (1978).

129 Gilbert v. Pennington Trap Rock Co., 135 N.J. Eq. 587, 591 (Ch. 1944).

130 *See, e.g.*, Hudson Trust Co. v. Boyd, 84 A. 715 (N.J. Ch. 1912) (one of the earliest cases that imputes the home mortgagee with rights after a foreclosure judgment).

131 *See* City Federal Sav. & Loan Ass'n v. Jacobs, 457 A.2d 1211, 1212 (N.J. Super. Ct. App. Div. 1983) (holding a mortgagee not compelled to take possession of real property and maintain it); Stanton v. Metro. Lumber Co., 152 A. 653 (N.J. Ch. 1930) (stating mortgagee not entitled to rents of mortgaged premises after default unless taking personal possession).

132 *See* Central Penn Nat'l Bank, 448 A.2d at 504. "The purpose of the foreclosure judgment is to determine the mortgagee's right to foreclose and the amount due on the mortgage." *Id.* Additionally, the foreclosure judgment allows a prospective purchaser in a sheriff's sale the right to title of the property which is free from any encumbrances. *Id. See also supra* note 17 for definition of sheriff's sale.

133 *See supra* note 19 for statutory definition of "redemption." *See* NELSON & WHITMAN, *supra* note 127, § 7.1, at 478. A redemption statute typically allows the mortgagor the right to satisfy in full his or her obligations under the mortgage contract until the time of a valid foreclosure sale. *Id. But see* Hardyston Nat'l Bank v. Tartamella, 267 A.2d 495, 497-498 (N.J. 1970) (holding that because New Jersey policy favors the mortgagor and because instances in which a mortgagor can redeem are rare, a mortgagor is permitted to redeem even after a foreclosure sale).

134 N.J.STAT. ANN. § 2A:50-4 (West 1952). Although a mortgagor can redeem even after a sheriff's sale, a mortgagor cannot bid on and purchase the home through the sheriff's sale. Heritage Bank v. Magefax Corp., 476 A.2d 1268 (N.J. Super. Ct 1984). *See also supra* note 19 for N.J. Court Rule allowing for objection to foreclosure judgment.

135 *Hardyston Nat'l Bank*, 267 A.2d at 498.

debtor and creditor.[136] If a mortgagor files a chapter 13 or chapter 11 petition in bankruptcy when the full contractual amount of the mortgage is due, the bankruptcy courts become involved. Hence, the stage is set for the uneasy entanglement between New Jersey property law and federal bankruptcy law.

B. *The Pearl Produced?:* Roach, Perry, *and Their Progeny*

In 1987, the United States Court of Appeals for the Third Circuit, in *Matter of Roach,*[137] first declared that a debtor could not cure[138] and reinstate a mortgage once it had been extinguished by a foreclosure judgment. In that case, the mortgagee obtained a foreclosure judgment against the debtor, and a sheriff's sale occurred.[139] During the ten-day redemption period,[140] the debtor filed a chapter 13 petition in bankruptcy court, attempting to pay the foreclosure judgment over the life of the plan.[141]

To aid its decision, the Third Circuit analyzed the legislative intent behind § 1322, mindful of Congress' articulated policy concerns.[142] Although cognizant of federal preemption,[143] the court noted that courts traditionally interpret bankruptcy rights accord-

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136 NELSON & WHITMAN, *supra* note 127, § 7.11, at 506. The court may direct a sheriff's sale if the debtor cannot satisfy the unpaid balance of the mortgage which has now merged into the judgment. Eisen v. Kostakos, 282 A.2d 421, 424 (N.J. Super. Ct. App. Div. 1971). Pursuant to New Jersey property law, the mortgage contract is annulled and merges into the foreclosure judgment. *Id.*

137 824 F.2d 1370 (3d Cir. 1987) (affirming bankruptcy and district courts' decision to deny the reinstatement of the mortgage during the life of the plan).

138 "Cure," as used in chapter 13 proceedings, refers to provisions in repayment plans for "curing" defaults in debt obligations. BLACK'S LAW DICTIONARY 381 (6th ed. 1991). Because the plan statutes allow debtors to modify most of the claims under the plan, a repayment will cure a default. *See supra* note 12 for text of the plan statutes.

139 *Id.* at 1371.

140 *See supra* note 19 for N.J. Court Rule allowing for redemption.

141 *Roach,* 824 F.2d at 1371.

142 *Id.* The Court analyzed the case conscious of its task to balance state law with bankruptcy law. In this endeavor, the court opined, a court is constrained to defer to state law when it is not clearly required to realize a federal interest. *Id.* at 1373. Thus, in the absence of specific legislative history or a significant federal interest, a bankruptcy court must dwell on bankruptcy issues within a state law realm. *Id.* at 1379. On a more practical level, the Court noted the debtor's right to modify the mortgage holder's rights under § 1322(b)(2) necessarily limited the debtor's right to cure defaults granted under § 1322(b)(3). *Id.* at 1375. *See also supra* Section III and accompanying text for legislative intent of § 1322.

143 U.S. CONST. art. VI, cl. 2. A federal statute will preempt a state law by virtue of the Supremacy Clause if Congress so intends. *Id.* Courts have no power to determine whether to preempt state law; their job is only to ascertain whether Congress intended

ing to state property law.[144] Additionally, the Third Circuit found no overriding federal policy concerns to displace the state property law.[145]

The court then determined that the right to cure a home mortgage default under § 1322(b) survives the contractual acceleration of the full mortgage debt.[146] It reasoned that Congress intended to prescribe a more substantial modification in § 1322(b) than mere contractual acceleration.[147] To reach this conclusion, the court noted the separate provisions under § 1322(b)(2), prohibiting the modification of mortgagees' rights, and under § 1322(b)(5), the authorization to cure defaults and maintain payments on long-term debts.[148] Thus, the Third Circuit decided that Congress intended a difference between "modifications" and "cures."[149] Further buttressing its conclusion, the court noted the

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a federal statute to preempt state law. *In re* Public Service Co., 108 B.R. 854, 874 (Bankr. D.N.H. 1989).

144 *Roach*, 824 F.2d at 1374. The Court noted that it must satisfy legislative intent under the Code and not preempt state law but decide bankruptcy law rights within the context of state property rights. The Court's opinion is consistent with the Supreme Court holding in Butner v. United States, 440 U.S. 48 (1979). In that case, the Supreme Court determined that state property law, not bankruptcy law, should define a debtor's property rights in a bankruptcy proceeding. *Id.* at 1374.

145 *Roach*, 824 F.2d at 1377. Beyond the point of a foreclosure sale, the Court concluded, there are no significant federal interests that justify disregarding the property interests which a New Jersey court adjudged to the mortgagee.

146 *Id.* at 1374. The Court noted the plausible arguments that another court adopted regarding post-acceleration contractual rights. *See also* Grubbs v. Houston First Am. Sav. Ass'n, 718 F.2d 694 (5th Cir. 1983), *rev'd*, 730 F.2d 236 (5th Cir. 1984)(*en banc*). This argument centered around the assertion that a post-accelerated cure would modify the mortgagee's rights, a modification that § 1322(b) prohibits. However, the Third Circuit argued that a post-acceleration cure does not, in a true sense, "modify" the rights of a mortgagee because it merely returns the debtor to full compliance with the mortgage contract and restores the original mortgagee-mortgagor relationship. *Roach*, 824 F.2d at 1375.

147 *Roach*, 824 F.2d at 1375.

148 *See supra* note 12 and accompanying text for statutory language. *But see In re* Strober, 136 B.R. 614, 622 (Bankr. E.D.N.Y. 1992)(reasoning in dicta that Congress intended debtors to repay their home mortgage debts through § 1322(b)(5)); *In re* Hall, 117 B.R. 425, 429 (Bankr. S.D. Ind. 1990)(stating § 1322(b)(5) gives debtor the right to cure defaults through a plan).

149 *Roach*, 824 F.2d at 1375. The *Roach* court came to this conclusion by way of viewing the legislative history. *Id.* First, the Court looked to the face of the statute, noting that Congress created separate provisions for cure and modification under § 1322(b)(2) and § 1322(b)(3). *Id. See also supra* note 12 for text of statute. Furthermore, the Court opined, Congress created § 1322(b)(5) to authorize a cure. The Court buttressed its findings by looking to the Code's legislative history. It noted that

existence of congressional bills that pronounced a difference between the two words.[150] It concluded, therefore, that the approved bill protects home mortgagees only from a modification of their claim.[151]

After finding that the right to cure does survive the mortgage acceleration, the court went on to ascertain when this right terminates.[152] Guided by New Jersey property law, the court determined that the right terminates with entry of a foreclosure judgment.[153] Thus, the *Roach* court determined, the bankruptcy court had properly refused to confirm the debtor's plan.[154] Significantly, in reaching its decision the Third Circuit concluded that New Jersey law limited the ability of debtors to cure under the § 1322(b) modification provision.[155] The court reasoned that because New Jersey law

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in the Commission's Report to the House, § 1322(b) authorized a debtor to modify any claim yet permitted only a cure for those claims secured solely by an interest in real property. *Id.*

Additionally, the court noted, the Commission expressly stated that the power to cure did not "authorize reduction of the size or varying of the time of installment payments." *Id.* (citing H.R. Doc. No. 137, 93d Cong., 1st Sess. Pt. II, at 204-206 (1973)). However, H.R. 8200 eliminated any difference between personal and real property, authorizing modifications and cures on all claims. Alternatively, the Senate bill carved out an exception from modification for mortgagees. Thus, concluded the Court, arose the distinction between the modification and cure under § 1322. *Id.* at 1376. *But cf. In re* Taddeo, 685 F.2d 24, 27 (2d Cir. 1984)(holding that although § 1322(b)(5) and its "notwithstanding (b)(2)" language appears to treat the power to cure as a subset of the power to modify, a more precise reading of that provision actually emphasizes that defaults in mortgages could be *cured* notwithstanding § 1322(b)(2)(emphasis added)).

150 *Comm'n Rep., supra* note 62, at 205-06. In its reports, the Commission differentiated modifications from cures under § 1322(b) when it allowed modifications and cures for claims secured in personal property, but authorized only cures for mortgage claims. Significantly, the Commission expressed that the right to cure defaults does not "authorize reduction of the size or varying of the time of installment payments. . . ." *Id.* Other courts also have noted the difference between modification and cure. *See, e.g, In re* Seidel, 752 F.2d 1382, 1385 (9th Cir. 1382)(holding modification, unlike cure, is an impermissible alteration of creditor's rights when it extends payments beyond creditor's nonbankruptcy rights).

151 *Roach*, 824 F.2d at 1376.

152 *Id.* at 1377.

153 *Id.* The court grounded its conclusion in two arguments: (1) New Jersey property law mandates the mortgagee's right to immediate and full payment; (2) there are no federal policy concerns material enough to override this law. *Id.*

154 *Id.*

155 *Id.* at 1377. The Court noted the longstanding law in New Jersey that the mortgage merges into the foreclosure judgment. *Id. See also* Colonial Bldg.-Loan Ass'n v. Mongiello Bros., 184 A. 635, 637-38 (N.J. Ch. 1936); Elmora West End Bldg. & Loan Ass'n v. Strede, 100 A. 344, 345 (N.J. Ch. 1917); Hudson Trust Co. v Boyd, 84 A. 715,

mandated an immediate termination of the mortgage contract, the right to "cure" was not applicable because the mortgage contract no longer existed.[156]

Additionally, the Third Circuit opined that even if the mortgage did not terminate, the debtor would find unavailable any § 1322(b) rights because New Jersey law creates new rights in a home mortgagee once a state court enters a foreclosure judgment.[157] The court stated that nothing in § 1322(b) suggests that Congress intended a "cure" to mean terminating a home mortgage creditor's rights created in a state court judgment.[158] Absent express congressional authority, the Third Circuit declined to construe § 1322(b) to import this intent.[159] Although other, nonmerger jurisdictions have reached the opposite conclusion,[160] the

715-716 (N.J. Ch. 1912); R. CUNNINGHAM & S. TISCHLER, 30 NEW JERSEY PRAC.: LAW OF MORTGAGES § 338 (1975). *See also supra* note 15 and accompanying text for statutes supplying instances in which the mortgage lien does not merge. Thus, because there is no contract after a foreclosure judgment, there is no way for the debtor to cure the default. *Roach*, 824 F.2d at 1377.

156 *Roach*, 824 F.2d at 1377.

157 *See, e.g.*, Eisen v. Kostakos, 282 A.2d 421, 424 (N.J. Super. Ct. App. Div. 1971) (holding that once a mortgagee obtains a foreclosure judgment that determines the amount presently due under the mortgage, the mortgagee then has the right to ask a court to direct a sale of the real estate to raise enough funds to satisfy the judgment). *Accord* Central Penn Nat'l Bank v. Stonebridge Ltd., 448 A.2d 498 (N.J. Ch. 1982).

158 *Roach*, 824 F.2d at 1378. The court then reiterated that § 1322(b)(5) was intended to cure contractual relationships but that such a relationship did not exist in the case at bar. Second, the court reasoned that even if New Jersey was not a merger jurisdiction, § 1322 could offer a debtor no refuge from the rights the judgment created in the creditor. *Id.*

159 *Id.* The court noted that because Congress failed to express federal preemption, Congress did not see cures of mortgage defaults as any threat to the integrity of state judgments. Furthermore, the court failed to recognize any reason why Congress would attempt to extinguish or suspend any state judgment. Examining New Jersey procedural law, the court observed that a New Jersey foreclosure action begins with the filing of a complaint. *Id.* (citing N.J. CT. R. 4:2-2). A mortgagee must serve this complaint on the mortgagor, who then has 20 days to file an answer. *Id.* (citing N.J. CT. R. 4:4-4, 4:6-1(a)).

The *Roach* court further opined that these steps are necessary to afford the mortgagor sufficient notice of a case pending and to prepare for it. *Roach*, 824 F.2d at 1378. If Congress preempted these procedural steps by allowing a mortgagor to file chapter 13, the court reasoned, the ability to settle would be preempted before reaching exhaustion. *Id. But see In re* Public Service Co., 108 B.R. 854, 879 (Bankr. D.N.H. 1989) (stating that merely because Congress did not foresee a merger state foreclosure problem is not a valid reason to "'manufacture' a specific intent for Congress in the guise of statutory construction").

160 *See, e.g., In re* Clark, 738 F.2d 869 (7th Cir. 1984) (holding that under Wisconsin

court emphasized its wedding to New Jersey law.[161]

The Third Circuit used similar reasoning in *First Nat'l Fidelity Corp. v. Perry*,[162] the second landmark case attempting to walk the uneasy tightrope between federal bankruptcy law and New Jersey property law.[163] In this case, however, the court faced a different issue. The *Perry* court determined the point in time after the foreclosure judgment entry but before the sheriff's sale occurs that a debtor's rights in the home are terminated and he or she would be barred from keeping his or her home.[164] Like the debtor in *Roach*, the *Perry* debtor attempted to spread out payments for this debt over the life of the § 1322 plan.[165] Relying heavily on its own reasoning in *Roach*, the *Perry* court determined that a debtor cannot provide for payment of this claim over the three- to five-year life of the plan.[166] Thus, the *Perry* holding extended *Roach* to deny the debtor the right to provide for the foreclosure judgment payments

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law a foreclosure judgment does nothing but judicially confirm the amount due under the acceleration clause and that chapter 13 plan providing for this payment after the judgment is acceptable). The Third Circuit, however, failed to distinguish *In re* Taddeo, 685 F.2d 24 (2d Cir. 1984), which was also decided in a merger jurisdiction. The *Taddeo* court held mortgagee payments throughout the life of the Chapter 13 plan to be acceptable. *Id.* at 28.

161 *Roach*, 824 F.2d at 1379. The court stated that although it may be appealing for bankruptcy courts to try creating a uniform bankruptcy law, this prospect was not sufficient to override state law with judge-made federal law. *Id.* The court established its argument based on Butner v. United States, 440 U.S. 48 (1979), explained *supra* note 144.

162 945 F.2d 61 (3d Cir. 1991).

163 *Id.* The Third Circuit recently has decided a third case involving mortgage foreclosure under § 1322. *In re* Stenardo, 991 F.2d 1089 (3d Cir. 1993) (holding no obligations or terms under the mortgage contract continue after a foreclosure judgment). Because this case involves Pennsylvania law, it will not be discussed here. *See* Louis A. Novellino, *Stenardo Closes The Merger Trilogy*, N.J.L.J., Aug. 16, 1993, at 11 (analyzing *Stenardo* under New Jersey law). Novellino argues that pursuant to New Jersey law, a foreclosure judgment does not create a lien; thus, no merger occurs. *Id.* He confirms that the *Stenardo* decision was correct because it held that a debtor cannot implement post-judgment taxes and insurance premiums in the plan, but that these claims were excluded from the state court judgment. *Id.* at 32. Finally, the author advocates that absent extreme circumstances such as fraud, there should be no merger in New Jersey property cases. *Id.*

164 *Perry*, 945 F.2d at 61.

165 *Id.* at 62.

166 *Id.* at 61. Additionally, the court relied on *In re* McKeon, 86 B.R. 350 (Bankr. D.N.J. 1988). *Id.* at 63. In that case, the court reasoned that paying a foreclosure judgment over the life of the plan "affect[s] an unauthorized modification of the respective creditors' rights created by the final state court foreclosure judgment." *Perry*, 945 F.2d at 63 (quoting *In re* McKeon, 86 B.R. at 385).

in the plan even before a sheriff's sale occurs.[167]

In the wake of the Third Circuit's *Roach/Perry* decisions, New Jersey federal bankruptcy courts under the Third Circuit's jurisdiction have adhered to its authority, refusing to distinguish cases to find a contrary outcome.[168] Although both *Roach* and *Perry* are recent decisions,[169] those cases set a precedent in New Jersey that most bankruptcy courts failed to disturb or question.[170]

Following the *Roach/Perry* reasoning, New Jersey bankruptcy courts held that the same restrictions to mortgage modification in chapter 13 petitions also applied in chapter 11.[171] The Third Circuit, however, recently overruled the bankruptcy and district court decisions that followed the *Roach/Perry* reasoning in *De Seno.*[172]

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167 *Perry*, 945 F.2d at 67.

168 *See, e.g., In re* Martinez, 73 B.R. 300 (Bankr. D.N.J. 1987). This case followed the Third Circuit's holding that a debtor may not reinstate the mortgage over the life of the plan even when the debtor previously had filed chapter 13 but withdrew her petition before filing once again after the mortgagee obtained a foreclosure judgment. *Id.*

169 *Roach*, 824 F.2d at 1370, was decided in 1987; *Perry*, 945 F.2d at 61, in 1991.

170 Although most courts have followed the Third Circuit, a minority have distinguished these decisions even under factually similar circumstances. *See, e.g.*, Matter of Brunson, 87 B.R. 304 (Bankr. D.N.J. 1988) (distinguishing *Roach* and in dicta deciding it would go against Congress' intent to disallow a chapter 13 debtor to retain his or her home and repay debts through the mortgage plan). In *In re* Coleman, 82 B.R. 15 (Bankr. D.N.J. 1988), a bankruptcy judge distinguished *Roach*, limiting it to its post-foreclosure sale facts. *Id.* at 16. The *Coleman* court decided that although a merger had occurred, the payments that the debtor proposed over the life of the plan were merely installment payments on the mortgage judgment. *Id.* at 19. This court, however, made its decision prior to *Perry*. *Perry* proscribed payment of the judgment over the life of the plan even before the sheriff's sale. *Perry*, 945 F.2d at 63.

171 New Jersey courts decided only four chapter 11 cases before the *De Seno* decision: Matter of Kennedy, 158 B.R. 589 (Bankr. D.N.J. 1993) (holding that although a debtor could modify the rights of a mortgagee entitled to immediate payment, modification by paying mortgagee over a 20-year payout plan was not fair and equitable); First Fidelity Bank v. Mulroy, 1993 WL 235622 (D.N.J. 1993) (interpreting Code's definition of "judicial lien" to deny debtor the right to pay foreclosure judgement over the life of the plan); Midlantic Nat'l Bank v. De Seno, Civil No. 92-4902 (AET) (1993) (holding right to cure a default on mortgage expired once the creditor obtains a foreclosure judgment); Matter of Smith, 156 B.R. 11 (Bankr. D.N.J. 1993) (deciding Third Circuit's *Roach/Perry* decisions binding precedent and holding that debtor could not repay foreclosure judgment over the life of the plan).

172 *De Seno*, 17 F.3d 642 (3rd Cir. 1994). Additionally, two recent Supreme Court opinions on related issues need mention here. First, in Rake v. Wade, — U.S. —, 113 S. Ct. 2187 (1993), Justice Thomas determined that an oversecured creditor (a creditor that holds a note worth more than the object of that note) was entitled to receive interest on arrearages under the debtor's plan. *Id.* at 2189. In that case, three debtors held oversecured mortgages on real property. *Id.* The petitioners' plans proposed

C. *New Jersey Bankruptcy Courts and the Applications of* Roach/Perry *to Chapter 11*

In 1994, the Third Circuit in *De Seno* decided that Chapter 11 debtors could repay the mortgagee over the life of a § 1123 reor-

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repaying both the principal and interest remaining on the mortgage. Additionally, the plans proposed to "cure" the mortgage default by paying amounts due from arrears. The plans, however, did not provide for interest on the arrearages, causing the banks to object to the proposed plan. *Id.* at 2190. Justice Thomas looked to § 506 as well as § 1322 to form his opinion. Section 506 reads:

> Determination of secured status:
>
> (a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition with any hearing on such disposition or use or on a plan affecting such creditor's interest.
>
> (b) To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose. . . .

11 U.S.C. § 506 (1978). Under section (b) of this provision, Justice Thomas determined that a mortgage holder was entitled to interest on the arrearages even if the mortgage contract itself made no such provision. *Rake*, 111 S. Ct. at 2191.

The Supreme Court recently decided another important case, related to but not on point with *Roach*. In Nobelman v. Am. Sav. Bank, — U.S.—, 113 S. Ct. 2106 (1993), the Court decided that under chapter 13 a debtor could not bifurcate his residence into secured and unsecured portions to reduce the home to its fair market value. *Id.* at 2108. The petitioners in that case argued that § 1322(b), prohibiting a debtor from modifying a claim resting solely in the debtor's principal residence, meant only the *secured* portions of the residence. *Id.* at 2109 (emphasis added). Justice Thomas, however, once again delivered the Court's opinion. The Court held that Congress intended § 1322 to prevent debtors from modifying the *rights* of the mortgage holders, not their claims. *Id.* at 2109-10. Justice Stevens' concurring opinion explains the Court's decision in an apologetic tone:

> At first blush it seems somewhat strange that the Bankruptcy Code should provide less protection to an individual's interest in retaining possession of his or her home than of other assets. The anomaly is, however, explained by the legislative history indicating that favorable treatment of residential mortgagees was intended to encourage the flow of capital into the home lending market.

Id. at 2111-12. Both decisions appear congruous with the Third Circuit, advancing the rights of the mortgage holder over the individual debtors' right to keep his or her home.

ganization plan. Based on this decision, the number of consumer debtors filing chapter 11 to avoid a *Roach/Perry* outcome likely increased. Thus, congressional involvement appeared pressing. The *De Seno*[173] court was the first district court to decide a chapter 11 case.[174] That court initially faced the burden of determining if § 1322 was similar enough to § 1123 to make *Roach/Perry* binding authority.[175] Consequently, that court held that because statutory language did not provide an exception for mortgagors, a chapter 11 debtor's right to cure a default expires once the mortgagee obtains a foreclosure judgment.[176]

Upon determining the mortgagee's rights, the *De Seno* court next turned to the issue of whether a debtor has the right to spread the foreclosure judgment payments over the life of the plan.[177] Aware of the fact that the § 1322(b)(2) provision prohibiting the modification of a home mortgage creditor's rights[178] is lacking in chapter § 1123, the court next distinguished between a lien, as the Code defines it,[179] and a judicial lien.[180] This distinction permitted the *De Seno* court to preempt any potential conflict that could have arisen between § 1123(a)(5)[181] and New Jersey property law.[182]

Moreover, by holding that a lien and a judicial lien are dissimilar, the court then could reconcile the difference in language between the chapter 13 and chapter 11 plan statutes.[183] Thus, the *De Seno* court was able to follow the *Roach/Perry* holdings and deny the

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173 *De Seno*, No. 92-4902 (AET) (1993).

174 Though all four chapter 11 cases were decided in 1993, the *De Seno* case was decided in April 1993. *See supra* note 171 citing other chapter 11 cases.

175 *De Seno*, No. 92-4902 (AET), at 3. Quoting the Third Circuit's *Roach* decision, the *De Seno* court opined that Congress' intent to cure defaults in the two statutes was identical. *Id.*

176 *Id.* at 4-5.

177 *Id.* at 5.

178 *See supra* note 12 for statutory language.

179 The Code defines "lien" as a "charge against or interest in property to secure payment of a debt or performance of an obligation." 11 U.S.C. § 101(33) (1978).

180 *De Seno*, No. 92-4902 (AET), at 5-6. The court in *In re Kennedy* differentiated a lien from a judicial lien. *Kennedy*, 158 B.R. at 595. There, the court noted that a lien is an inherent claim or right, while a judicial lien is *obtained* through a court's judgment. *Id.*

181 *See supra* note 12 for text of § 1123.

182 *De Seno*, No. 92-4902 (AET), at 6. With this differentiation, Judge Thompson held that the "modification of *any* lien" would not affect the mortgagee's right to full and immediate payment. *Id.* (emphasis added).

183 *Id.*

confirmation of the plan.[184]

On appeal, the Third Circuit affirmed in part and reversed in part.[185] The court extended the *Roach* holding to chapter 11 debtors regarding their right to cure a mortgage default.[186] Consequently, the court determined that the chapter 11 debtor terminated its right to cure once the mortgagee obtained a foreclosure judgment.[187]

The court then considered whether a chapter 11 debtor could repay the mortgage foreclosure judgment over the life of the

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184 *Id.* at 7. Both *First Fidelity Bank v. Mulroy* and *In re Smith* followed the *De Seno* court's holdings. Before the appellate *De Seno* case was decided, another New Jersey bankruptcy court, the *Kennedy* court, decided a chapter 11 case utilizing a different analysis, though holding concurrently with *Roach, Perry, De Seno,* and *Smith.* In that case, the court used the Bankruptcy Code's definitions to construct the intent of § 1123. The court noted that "claim," as the Code defines it, certainly would include a foreclosure judgment under New Jersey law. Hence, the court concluded, the Code's definitions supplied the potential context under which a debtor could modify a mortgagee's rights.

The *Kennedy* court then criticized both the *De Seno* and *Smith* decisions. It disregarded the *De Seno* reasoning, stating that the lien created by the mortgage contract is inherent, unlike a judicial lien which a mortgagee obtains only after a judicial decision. Consequently, the court deemed the *De Seno* argument unpersuasive because it failed to demonstrate why § 1123, which contains no mortgagee creditor exception, should be interpreted similar to § 1322. Furthermore, the court dismissed the *Smith* court's reasoning on three separate grounds, as follows: (1) The policy reasons that *Smith* used to underscore its holding, though perhaps well-grounded, were not within the meaning of § 1123; (2) 11 U.S.C. § 1124 (1978) furnishes the answer to the question raised in *Smith* that there is no positive statute for satisfaction of a foreclosure plan lay-out; and (3) There is no particular mortgagee non-modification provision as in chapter 13; therefore; there is no bar to mortgagee modification. *Smith,* 156 B.R. at 595.

Having erased the markings left by previous courts, the *Kennedy* court was free to leave its own signature on this area of bankruptcy law. Finding no need to analyze the legislative history as is necessary in a chapter 13 context, the court reiterated that the language of § 1123(a)(5)(e) expressly authorized a modification of a judicial lien. It then innovatively argued that § 1129(b) wielded a weapon for mortgagees to defend their interests. Employing the "fair and equitable" requirement under the statute, the court stated that any modification of a mortgagee's expected rights would be unjust. *Id.* at 645. Thus, the court joined the other four New Jersey decisions by holding that a debtor cannot provide for the foreclosure judgment payments over the life of the plan.

185 *De Seno,* 17 F.3d at 646.

186 *Id.* at 644. After reviewing the legislative history of the statute, the Bankruptcy Code, and the policies that gave impetus to the Bankruptcy Code, the court failed to ascertain how "the concept of 'curing a default' should be ascribed any more than a single, consistent meaning throughout the Code." *Id.*

187 *Id.*

plan.[188] On this issue the court reversed the district court's judgment.[189] Specifically, the court criticized the district court's characterization of a mortgage foreclosure judgment as a judicial lien.[190] Citing the *Perry* decision, the court reiterated that in New Jersey a mortgage foreclosure judgment is a "security interest" according to the Bankruptcy Code's definitions.[191] Upon characterizing the foreclosure judgment as a security interest, the court looked to § 1123(a)(5)(E) to conclude that a modification was acceptable under the statute.[192] The creditor, Midlantic, then attempted to make a bankruptcy code policy argument. It argued that Congress could not have intended that debtors avoid losing their real property merely by filing under chapter 11 rather than chapter 13.[193] However, the Third Circuit remained firm in its decision, noting that the difference in the statutory language justified the opposing outcomes.[194] Consequently, a mortgagee cannot conduct a sheriff's sale if a chapter 11 debtor successfully confirms the foreclosure judgment payments as part of its § 1123 plan.

D. *Other Merger Jurisdictions*

As the *Roach* court noted,[195] New Jersey is not the only merger

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188 *Id.* n.2. Although this issue appears to be the chapter 11 equivalent of the *Perry* decision, the court declined to import this analogy to its holding. Specifically, the court noted that the statutory exception to home mortgage lenders provided in § 1322(b)(2) was lacking in §1123. Instead, the court cited the different language in § 1123, particularly section (5)(E), and determined that "[o]ur analysis in *Perry*, therefore, provides only tangential guidance to our resolution of the issue in this case." *Id.*

189 *Id.* The court opined that the district court had erred when it made a distinction between a "lien" and a "judicial lien." *See supra* note 179 for this distinction. Instead, the court reasoned that a judicial lien is not different from a lien, but rather it is a type of the larger class of liens. *De Seno*, 17 F.3d at 645. It buttressed its conclusion on a section-by-section analysis of the Senate Judiciary Committee report that defines lien broadly.

190 *Id.*

191 11 U.S.C. § 101(45) (1978).

192 *See supra* note 12 for text of § 1123.

193 *Id.*

194 *Id.* To support its decision, the Third Circuit noted the recent United States Supreme Court decision of Toibb v. Radloff, 501 U.S. 157 (1991). *See supra* note 6 for case explanation. Specifically, the court noted that the *Toibb* court grounded its decision on the plain language of the Bankruptcy Code. *See infra* note 199 for explanation of the plain-language rule. Thus, adhering to the plain-language argument, the court disregarded the effects that having opposing holdings under § 1322(b)(2) and § 1123 would elicit.

195 824 F.2d at 1377.

jurisdiction.[196] Other states faced with circumstances identical to those in *Roach* and *Perry* have reached similar conclusions in chapter 13 cases.[197] Similar to the Third Circuit, other merger jurisdiction courts have defended the harsh results that befall a debtor after a foreclosure judgment, juxtaposing these results to the benevolent policies of the Code.[198] Like the Third Circuit, these courts recognized the "plain meaning" rule.[199] Additionally, merger jurisdiction courts noted other provisions within the Code where Congress stated explicitly that bankruptcy law would displace state law.[200] Because § 1322 contains no such language, these courts argued, Congress' preemptive intent should not be inferred lightly.[201]

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196 Other merger jurisdictions include Connecticut, Delaware, District of Columbia, Illinois, Kansas, Oregon, New York, and South Dakota. *See also* ILL. ANN. STAT. ch. 735, para. 5/15-1401 (Smith-Hurd 1993); *In re* Skelly, 38 B.R. 1000 (D. Del. 1984).

197 *See, e.g., In re* Skelly, 38 B.R. 1000 (D. Del. 1984); *In re* Maiorino, 15 B.R. 254 (Bankr. D. Conn. 1981); *In re* J.V. Knitting Serv., Inc., 22 B.R. 542 (Bankr. D. Del. 1982); *In re* Flowers, 94 B.R. 3 (Bankr. D. Dist. Col. 1988); Matter of Boromei 83 B.R. 74 (Bankr. M.D. Fla. 1988); Matter of Akins, 55 B.R. 183 (Bankr. M.D. Fla. 1985); *In re* Ristich, 57 B.R. 568 (Bankr. N.D. Ill. 1986); *In re* Langguth, 52 B.R. 572 (Bankr. N.D. Ill. 1985); *In re* Jenkins, 14 B.R. 748 (Bankr. N.D. Ill. 1981); Matter of LaPaglia, 8 B.R. 937 (Bankr. E.D.N.Y. 1981). *See also* James S. Sable, *A Chapter 13 Debtor's Right to Cure Default Under Section 1322(b): A Problem of Interpretation*, 57 AM. BANKR. L. J. 127 (1983); Ann B. Miller, *Chapter 13 Bankruptcy: When May A Mortgage Debtor Cure The Accelerated Mortgage Debt Using Section 1322(b)(5)*, 8 U. DAYTON L. REV. 109 (1982).

198 *See In re* Jenkins, 14 B.R. 748 (Bankr. N.D. Ill. 1981). Some courts justify their holdings by stating that Congress, not the courts, must effectuate any change. *Id.* "Though the court realizes the above result may be extremely harsh for some debtors and the court sympathizes with their plight, their avenue for relief lies with Congress, not the courts." *Id.* at 751. *See also In re* Glenn, 760 F.2d 1429, 1433 (6th Cir. 1985) (opining that although at first blush § 1322(b) appears to go against the Code's policy, Congress meant to afford preferred status to home mortgage lenders).

199 Under the "plain meaning rule," courts look to the common understanding of particular words in a statute. "'Very strong' evidence or explicit language from legislative history is necessary to overcome the plain meaning naturally to be drawn from the language of the statute." *In re* McKeon, 86 B.R. 350, 383 (Bankr. D.N.J. 1988) (citations omitted). *See also* United States v. Ron Pair Enter., Inc. 489 U.S. 235 (1989); *In re* Public Service Co., 108 B.R. 854 (Bankr. D.N.H. 1989).

200 *See* Matter of Tynan, 773 F.2d 177 (7th Cir. 1985) (holding § 108 extends state redemption period for 60 days from the commencement of a bankruptcy proceeding); *accord In re* Martinson, 731 F.2d 543 (8th Cir. 1984); Johnson v. First Nat'l Bank of Montevideo, 719 F.2d 270 (8th Cir. 1983), *cert. denied*, 465 U.S. 1012 (1984). *See also In re* Jenkins, 19 B.R. 105 (D. Colo. 1982); *In re* Johnson, 8 B.R. 371 (Bankr. D. Minn. 1981); *In re* Saint Peter's School, 16 B.R. 404 (Bankr. S.D.N.Y. 1982); (holding § 362, the Code's automatic stay provision, should be literally construed to suspend the running of a state statutory period of redemption).

201 *In re* Public Service Co., 108 B.R. 854 (Bankr. D.N.H. 1989). Preemption is not

Surprisingly, one Circuit court that declined to follow the Third Circuit decisions was the Second Circuit.[202] Decided five years prior to *Roach*, in *In re Taddeo* the Second Circuit acknowledged that New York property law required the discontinuation of mortgage rights after a foreclosure judgment. However, it refused to prohibit a debtor from implementing monthly payments to its mortgagee in its plan.[203] Analyzing the language of § 1322, the Second Circuit construed Congress' intent to include judicial permission to reinstate a debtor's mortgage.[204]

Significantly, the court opined that its decision to allow the debtor to remain in possession of its home is consistent with the Bankruptcy Code's purpose.[205] The court reasoned further that the repercussions of prohibiting debtors to reinstate their mortgage would prompt "unseemly and wasteful races to the courthouse."[206] Consequently, the Second Circuit stood alone among merger jurisdiction circuit courts in allowing reinstatement of the original mortgage payment schema.[207]

In chapter 11 cases, other merger jurisdictions have held similarly to the *De Seno* court.[208] Although § 1123 uses different lan-

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a legal issue for a judge to decide. Rather, judges must merely attempt to ascertain statutory construction. Thus, preemption should not be inferred lightly. *Id.*

202 *In re* Taddeo, 685 F.2d 24 (2d Cir. 1982).

203 *Id.* at 29.

204 *Id.* at 26. The court stated two reasons for its language-based conclusions: (1) the debtor's power to cure under § 1322(b)(5), as Congress must have contemplated it, must also mean the power to decelerate a mortgage and reinstate its original payment schedule. *Id.*; (2) the "cure" provisions under § 1322(b)(3) and (b)(5) do not "modify" a home mortgagee's rights as prohibited under § 1322(b)(2). *Id.* at 27.

205 *Id.* at 25. "We do not believe that Congress labored for five years over this controversial question only to remit consumer debtors—intended to be primary beneficiaries of the new Code—to the harsher mercies of state law." *Id.*

206 *Taddeo*, 685 F.2d at 27. *But see* Butner v. United States, 440 U.S. 48, 55 (1979) (quoting Lewis v. Mfr. Nat'l Bank, 364 U.S. 603, 609 (1961), parties should not receive "a windfall merely by reason of the happenstance of bankruptcy.")

207 Although other Circuit courts have held similar to the *Taddeo* court, those cases appear in jurisdictions in which the state law does not contain the "merger doctrine." *See, e.g, In re* Clark, 783 F.2d 869 (7th Cir. 1984). Like *Roach*, the *Clark* court decided that a debtor could not "cure" a mortgage payment once the mortgage holder obtained a foreclosure judgment. *Id.* at 870. There, the court noted that "modify" and "cure" are nowhere defined in the Bankruptcy Code. *Id.* at 871. Looking to the plain meaning rule, the Seventh Circuit determined that the plain meaning of "cure" in § 1322 is "to remedy or rectify the default and restore matters to the *status quo ante*." *Id.* at 872. Thus, a debtor could provide for the foreclosure debt payments over the life of the plan. *Id.* at 874.

208 *See, e.g.*, Matter of Celeste Court Apartments, Inc. 47 B.R. 470 (D.C. Del.

guage than § 1322,[209] courts have noted Congress' apparent similar purpose for creating these provisions.[210] Additionally, merger jurisdiction courts looked to legislative history, finding Congress' similar intent in creating both plan statutes. Consequently, those courts reasoned, they should be applied similarly.[211] Courts found the identical policy reasons for refusing to preempt state law applied under chapter 11 plans.[212]

V. *The Bankruptcy Reform Act of 1994: Overruling the* Roach/Perry *Decisions*[213]

Although proposed twice before,[214] Congress recently passed a

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1985) (following *Skelly* and holding it applicable to chapter 11 cases); *In re* Monroe Park, 18 B.R. 790 (Bankr. D. Del. 1982). Other decisions, though not directly on point, have upheld the *De Seno* reasoning, applying it to different contexts. *See, e.g.*, Matter of McKinney, 84 B.R. 731 (D. Kan. 1988) (holding similar to *Roach* under chapter 12, farming plan statute); Johnson v. First Nat'l Bank of Montevideo, Minn., 719 F.2d 270 (8th Cir. 1983) (holding in chapter 11 case that Minnesota merger law prohibits bankruptcy courts from using § 105 or § 362 of the Code to extend the redemption period).

209 *See supra* note 12 stating relevant portions of § 1322 and § 1123 and their language differences.

210 *See, e.g., In re* Forest Hills Associates, 40 B.R. 410 (Bankr. S.D.N.Y. 1984). When examining the legislative intent documents, courts often note the similar purposes and applicability between the two plan provisions. *Id.*

211 *In re* Monroe Park, 18 B.R. 790, 791 (Bankr. D. Del. 1982) (noting that while § 1124 allows debtors to define and impair creditor classes, the Senate report on § 1124 suggests that this is a limited right, applicable to a *temporary* crisis which the plan is intended to alleviate). Courts have looked to the legislative intent behind § 1123 and § 1124 when reaching their decisions. *Id.*

212 Matter of Celeste Court Apartments, Inc., 47 B.R. 470, 475 (D. Del. 1985). Courts have noted that considerations of comity and appropriate respect for state court judgments require them to decline from modifying a state court judgment unless expressly authorized by Congress. *Id.*

213 H.R. 5116, 103d Cong., 2d Sess. (1994) [hereinafter H.R. 5116].

214 In 1992, Congress proposed legislation that would have overruled *Roach.* 138 CONG. REC. H11052 (daily ed. Oct. 3, 1992). The proposal included a separate subsection (c) which would have appeared after (b) and in § 1332 and read:

> (c) A default with respect to, or that gave rise to, a lien on the debtor's principal residence may be cured under paragraph (3) or (5) of subsection (b), notwithstanding applicable nonbankruptcy law, until such residence is sold under such lien and in accordance with applicable nonbankrupcty law.

138 CONG. REC. H11052 (daily ed. Oct. 3d, 1992). *See also* David F. Bantleon & Kathy L. Kresch, *Congress May Fix the Bankruptcy Code,* BOTTOMLINE, Mar.-Apr. (1992), at 7.

Senators Howell Heflin (D-Ala.) and Charles E. Grassley (R-Iowa) introduced this legislation after sitting in on five public hearings held by the Subcommittee on Courts and Administrative Practice of the Senate Judiciary Committee. *Id.* Additionally,

bankruptcy amendment that overruled the Third Circuit's *Roach/Perry* line of decisions.[215] The Bankruptcy Reform Act of 1994 (hereinafter "1994 Act") changes § 1123 favorably for debtors.[216] Moreover, Congress expressly overruled *Roach/Perry* with its

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"[s]tatistics compiled by the Administrative Office of the United States Courts show that 1990 and 1991 were record years for bankruptcy filings. Over 880,000 bankruptcy cases were filed during the 12-month period ending June 30, 1991, an increase of 21.4 percent over the previous year." *Id.* Among its more notable changes, this bill proposed a new "chapter 10," allowing small businesses a "fast track" through the bankruptcy courts. *Id.* at 8. In chapter 13, the proposed bill would have preempted the need for the Supreme Court to decide Nobelman v. Am. Sav. Bank, —U.S. —, 113 S. Ct. 2106 (1993), discussed *supra* note 172. The bill precluded debtors from bifurcating real property claims on a debtor's principal residence into secured and unsecured claims. Bantleon & Kresch, *supra* at 9.

Congress also proposed a 1993 amendment to § 1322(b)(2) that would have overruled *Roach*. Omnibus Bankruptcy Reform Legislation, S. REP. No. 103-168, 103d Cong., 1st Sess. (1993). *Reprinted in* 373 Bankr. L. Rep. 1 (CCH) (Nov. 18, 1993). While the proposed amendment to § 1322(b)(2) was similar to the 1992 amendment, the explanation accompanying this amendment expressed the Senate's wish to overturn *Roach* and *Perry*.

215 The explanatory statements to the 1993 amendment state explicitly that this amendment is intended to overrule *Roach* and *Perry* because those decisions erroneously allowed state law to curtail rights created in Federal bankruptcy law. *Id.* at 51. Well-known scholars within the bankruptcy field also have determined that the Third Circuit wrongly decided *Roach* and *Perry*. *See* 5 COLLIER ON BANKR. (15th ed.), commentary to §§ 1322-28. The volume reports the *Roach* holding, incorporating its own opinion of it:

> After properly finding that the legislative objective of helping debtors to save their homes overrode state law denying a right to cure after acceleration of payments, the *Roach* court then ignored that objective, deciding that state law still controlled when the right to cure under the Bankruptcy Code was lost. In doing so, the court undermined the purposes of section 1322(b)(5). It is not uncommon for unsophisticated consumer debtors to seek counsel only after judgment, when a foreclosure sale is imminent, a time when they would no longer have a right to cure under the *Roach* decision. Moreover, to permit the variations of the laws of different states to govern the effect of an acceleration and its curability would be to defeat one of Congress' important purposes, to provide for a uniform national remedy for chapter 13 debtors.

Id. at § 1322-29 to -30.

216 H.R. 5116, *supra* note 213, at 46. Section 1123(b) will now read in relevant part:

> (5) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and . . . .

Id. Not all chapter 11 debtors will be affected by this amendment, however, "[s]ince it is intended to apply only to home mortgages, it applies only when the debtor is an individual. It does not apply to commercial property. . . ." CONG. REC. H10767 (daily ed. Oct. 4, 1994).

changes to § 1322.[217] Congress noted expressly that the *Roach* decision "is in conflict with the fundamental bankruptcy principle allowing the debtor a fresh start through bankruptcy."[218]

VI. Conclusion

Congress' Bankruptcy Code policy concerns appear to have shifted within the small span of time since the Code's inception. Initially, it appears Congress endeavored to implement its "fresh start" policy.[219] The plan statutes are a testimonial to that end, allowing debtors to reorganize rather than to liquidate, and in most instances to discharge their debts. Mindful of this policy, Congress endeavored, particularly in the 1984 Code amendments, to implement another policy: a balance on the debtor-creditor rights scale.[220]

The 1994 Bankruptcy Reform Act properly overruled the Third Circuit's *Roach* and *Perry* decisions. While state law must fill the gaps where the Code is silent,[221] Congress long had articulated the "fresh start" policy. This policy should have persuaded the

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217 H.R. 5116, *supra* note 213, at 66. The relevant changes to § 1322 read:

> (c) Notwithstanding subsection (b)(2) and applicable nonbankruptcy law—
> (1) a default with respect to, or that gave rise to, a lien on the debtor's principal residence may be cured under paragraph (3) or (5) of subsection (b) until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law, and
> (2) in a case in which the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the debtor's principal residence is due before the date on which the final payment under the plan is due, the plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5) of this title.

Id. Congress stated expressly that these amendments were meant to overrule *Roach* and *Perry*. CONG. REC. H10769 (daily ed. Oct. 4, 1994).

See also Walter A. Effross, *Proposals Set for Code Reform*, 136 N.J.L.J. (supp.) Jan. 17, 1994, at 20. "[S]ection 1322 would be amended to indicate that state law does not trump any right that the debtor may have under the code as of the petition date to redeem her real property, to cure default, or to reinstate her mortgage payments." *Id.*

218 CONG. REC. H10769 (daily ed. Oct. 4, 1994).

219 *See supra* note 101 and accompanying text discussing the "fresh start" policy.

220 However, the 1994 Bankruptcy Reform amendment appears to be backing away from creditor-rights concerns, at least in the consumer bankruptcy area. Forgetting its prior concerns about the home mortgage-lending industry, Congress now appears to favor debtors keeping their homes.

221 *Butner*, 440 U.S. 48 (1979)(holding that bankruptcy courts should follow state law where Bankruptcy Code statutes and policy concerns are silent).

Third Circuit to a contrary holding. No outcome could thwart the "fresh start" effort more than when a chapter 13 debtor loses his or her home.

Furthermore, the § 1322 amendments will not undermine the creditors'-rights concerns of Congress. If a chapter 13 debtor must still pay the foreclosure judgment sum within the plan, the home mortgage industry will not be affected. Contrary to concerns expressed during the Code's formation,[222] the outcome that Congress has now mandated maintains a balance between debtor and creditor rights.

Alternatively, the Third Circuit's chapter 11 *De Seno* case, allowing chapter 11 debtors to implement the mortgage sum in its plan, appears to be consistent with the legislative intent of § 1123. While the 1984 amendment was deemed only "technical," the Third Circuit gave it substantive effect in the *De Seno* opinion.[223] The *De Seno* holding, although based on precarious grounds, is a proper decision. Similar to chapter 13 debtors, legislative intent appears to demonstrate that bankruptcy policy concerns should preempt state law in chapter 11 cases when the debtor is an individual.

Although Bankruptcy courts, or any court attempting to decipher the often-ambiguous Code, are certainly undertaking a laborious task, not only state law but logic should supplement a court's judgment when deciding a bankruptcy case. Clearly, Congress did not mean for reorganizing debtors to lose their real property. Although these debtors may not maintain a significant property interest, they inflict no harm upon creditors by merely providing for payment within the life of their reorganization plan. More importantly, the fundamental "fresh start" policy cannot be achieved through any other outcome.

Although bankruptcy law, particularly when meshed in state property rights, can be a deluge of technical interpretations, courts must look to the Bankruptcy Code's overall policy concerns. These concerns appear to ensure that a homeowner will not lose his or

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222 *See Comm'n Rep., supra* note 62 (discussing the consequences to the home mortgage lending industry without a § 1322(b) exception for creditor's whose interests lie solely the debtor's principal residence).

223 *See supra* note 119 and accompanying text noting that substantive changes occurred during the 1984 amendments albeit Congress considered these amendments "technical."

her home. Clearly, Congress' intent in this context is to champion debtors, ensuring that their "best laid plans" will not go awry.